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COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
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I. INDIGENT DEFENSE NEWS

PLAINTIFF'S NEEDED

HELP!! ON MAY 15, 2003, names, addresses, photographs, descriptions of the offenses and other information regarding level 3 (high risk) sex offenders WILL BE POSTED ON AN INTERNET WEBSITE accessible worldwide.

We need indigent plaintiffs for a lawsuit challenging the plan of the governor and the sex offender registry board to implement this plan. We think we have a good chance of winning the lawsuit. So far we have only one or two indigent plaintiffs interested in serving as named plaintiffs. We would like a few more indigent level 3 offenders. DON'T WAIT UNTIL THE DAMAGE IS DONE. Please contact Carol Donovan at cdonovan@publiccounsel.net or Eve Hanan at mhanan@publiccounsel.net with names of potential plaintiffs.

CPCS ANNUAL TRAINING CONFERENCE

There are still seats available at the CPCS Annual Training Conference which will be held on Friday, May 9, 2003 from 9:00 a.m. to 5:00 p.m. at the Worcester Centrum Centre in Worcester MA. Criminal Law, Children and Family Law, and Mental Health programs will be offered.

Nationally renowned speaker Steve Harmon from Riverside, California will give the keynote address at this year's conference. The topic of his speech will be **"Compelling Arguments: Clients Win When You Dare to Communicate the Emotion in your Case"**. Other topics covered at the conference will be: **"Confronting and Using Medical Evidence in Child Abuse Cases"** (Stephanie Page, Esq)**; "Defending Clients Facing "Enhanced" Penalties: Knock Out the Predicate Offense *or* They Can't Build an Enhanced Sentence on a Sandy Foundation"** (Miriam Conrad, Esq., Benjamin Keehn, Esq. & Shannon McAuliffe, Esq.) ; **"Defending the Armed Self-Defense Case: Use Police Training and Other Strategies to Show Your Client Was Reasonable"** (Lisa Steele, Esq. & Captain Massad Ayoob); **"A Practical Guide to Litigating Motions for Discovery of Privileged Records – 'Bishop' Never Ends"** (Carol Donovan, Esq. & Lisa Grant, Esq.)**; "Fulfilling the Promise of Gideon Through Increased Compensation Rates: An Advocacy Workshop for Getting Involved and Getting Results"** (William Leahy, Esq. & Anthony Benedetti, Esq.) **Representing Incarcerated Parents and their Children in Child Welfare Cases** (Norah Kane, Esq., Dorothy Storrow, Esq., & Leslie Walker, Esq.); **"Meeting the Needs of Infants and Toddlers in Foster Care"** (Alice Carter, Ph.D., & Ron Benham, M.Ed.; and **Brainstorming Brain Disorders – An Informal Case Crunching and Advice Question Workshop** (Stan

Goldman, Esq.)

The cost for the conference is a $95.00 contribution to the Training Trust. This entitles participants to attend all seminars and the awards luncheon, and to receive conference materials from all of the programs offered. To Register Please use the registration form posted at CPCS's web site, http://www.state.ma.us/cpcs/training. Or call the Training Unit at (617) 988-8323 to have a form mailed or faxed to you.

II. CHIEF COUNSEL'S MESSAGE

Why "Flat Fee" Contracting Is Bad for Massachusetts

Governor Romney's budget proposal for "flat fee" contracting by private counsel for CPCS case assignments has generated a significant amount of controversy.
In his H.1 proposal, in an outside section entitled "CPCS cost reductions", the Governor has proposed that

> " private criminal counsel…appearing… in the district court department on cases within the final jurisdiction of the district court department shall be paid on a flat fee basis per case or groups of cases for all pretrial representation and an hourly fee of $65.00 for trial before a judge or jury and that no such counsel shall receive more than $30.00 unless he has certified under the penalty of perjury that he has discussed the complaint with each assigned client for at least 15 minutes prior to disposition[.]"

For several important reasons, this proposal is deeply flawed, and warrants decisive rejection by the Legislature:

1. **Flat Fee Representation Is an Old and Discredited System, which Massachusetts Rejected More than Fifteen Years Ago**

The idea of "flat fee" contracting is hardly new to Massachusetts. Rather, it is an old, discredited and discarded idea. Flat fee representation provides an overwhelming financial incentive for assigned attorneys to at best take routine shortcuts, or at worst to avoid altogether their responsibility to investigate the facts, research the law, consult in depth with their client, file necessary motions, engage the services of necessary experts, and prepare each case comprehensively for trial or other appropriate disposition. CPCS inherited a flat fee system when it began operations in July, 1984. One of the Committee's first acts was to commission a comprehensive study of the flat fee system by the National Legal Aid and Defender Association. In 1986, the final report of the NLADA Statewide Evaluation of the Massachusetts Bar Advocate Program condemned the flat rate system because it "establish[ed] a disincentive for thorough preparation and aggressive defense advocacy." In 1987 the Legislature eliminated the flat rate system, and established a compensation system based on hourly rates. To now retreat from that fundamental reform would be to relegate the poor to second-class representation based upon their poverty, and would guarantee the daily violation of the many quality control protections provided by G. L. chapter 211D and the CPCS Performance Guidelines.

2. **"Flat Fee" Fails as a Fiscal Control Measure in Massachusetts**

Even if viewed purely as a fiscal control measure, and ignoring completely all concerns about quality, this "flat fee" proposal fails the test of fiscal responsibility because it fundamentally misconstrues the cost factors which drive the CPCS budget. In Massachusetts, it is not generous or increasing hourly payment rates which cause budget increases, for our hourly rates are among

the lowest in the entire nation. Nor has there been a tendency by lawyers to bill more hours per case, in order to compensate for stagnant hourly rates: our data show that the average number of hours billed for all criminal cases in FY02 was 6.69 hours; almost exactly equal to the average of 6.68 hours per case during the previous five fiscal years. For fiscal year 2002, the average compensation for a District Court case was $191.36. **It is not the cost of each case, but the steadily increasing number of cases, which drives CPCS costs, and which must be addressed if those costs are to be controlled.** From FY96 to FY02, CPCS absorbed almost 30,000 additional cases; a 13% increase resulting in a total of over 250,000 cases. What is needed is decisive action to limit or to reverse these increases. Toward that end, CPCS has proposed the following reforms, among others: 1) treat 15,000 low level misdemeanors as civil infractions by a simple amendment to existing law; 2) restrict significantly the excessive length of the sex offender registry "reach back" period; 3) retool drug law enforcement from its current overemphasis upon incarceration to a primary reliance upon treatment; 4) require parents who can afford to pay something toward their own representation or their child's representation to do so; 5) require at least annual review of all determinations of indigency. It is time to recognize that attempts to chip away at already bargain basement assigned counsel rates are not an acceptable answer to the Commonwealth's fiscal crisis.

3. Some Reality About the Heralded "Success" of Flat Fees in Wisconsin

The state of Wisconsin has been suggested as a successful contracting model which Massachusetts might wish to emulate. For this reason, we have taken a look at the Wisconsin experience. What we have learned should persuade any objective observer that the system now in effect in Wisconsin offers nothing useful for Massachusetts, either in terms of cost or quality. **First,** the scope of contracting in Wisconsin is tiny, barely 10,000 cases: a drop in the bucket compared to the 122,000 new District Court assignments in Massachusetts during FY02. Furthermore, the program operates in only ten of Wisconsin's 72 counties. Yet even this tiny program requires the employment of a contract administrator and an assistant, and contributions of time by local public defender staff. The Governor's proposal contains no funding or resources to administer the mega-contracting he envisions for Massachusetts. Yet it is clear that a significantly more extensive bureaucracy would be required to administer a program twelve times larger in Massachusetts. **Second,** savings in Wisconsin are generated by contracting at 80% of the average billing for non-contract cases; and those cases are billed at $40 per hour. Thus, the Wisconsin contracts pay, on average, $32 per hour, or two dollars more than private counsel are paid by CPCS. We asked the administrator of the Wisconsin program whether contracting would still be cost-effective if their hourly rate were $30. She answered "no, because no lawyers would take the contracts." **Third**, Wisconsin contracts cover only misdemeanors (offenses punishable by no more than one year in jail); not the full gamut of misdemeanors and concurrent felonies which fall within the broad jurisdiction of the District Court, including the two-year minimum mandatory "school zone" cases, as proposed by the Governor. This has two important consequences: i) as a fiscal matter, attorneys can afford to bid lower on cases which present lesser consequences, and ii) the <u>human</u> consequences of substandard lawyering would be aggravated if this proposal were imposed in Massachusetts. **Fourth**, our investigation reveals that the reported Wisconsin fiscal "success" is already wearing thin. We are reliably informed that Wisconsin attorneys' interest in bidding on these contracts is dwindling, due to the low rate of compensation. **Fifth,** if the Wisconsin "80%" model were to be followed in Massachusetts, it would reduce per case compensation to a total of $153.09; or an average hourly rate of $24.11. Such a reduction would surely accelerate, perhaps dramatically, the ongoing exodus of private lawyers from CPCS cases, thereby threatening the very right to counsel. **Sixth,** the Wisconsin flat fee system is a bad example to follow on its merits. It

requires prior agency approval for the most routine case preparation expenditures; it provides not a penny of additional compensation for trials, or cases which require pretrial motions or hearings. It is a purely cost-driven system which denigrates rather than enforces the fundamental constitutional right of poor people to the effective assistance of counsel. And, since its provisions violate not only the extensive Performance Guidelines established by CPCS, but also many of the protections which were built into chapter 211D when it was enacted almost twenty years ago, its implementation would require legislative dismantling of fundamental statutory safeguards which, we insist, are essential to the enforcement of state constitutional obligations as set forth in the Massachusetts Declaration of Rights.

These are some of the reasons why we believe that the Wisconsin model offers nothing positive for Massachusetts. In my next message, I will try to articulate my view of the right way for Massachusetts to ensure the quality of indigent counsel representation, while controlling the cost of providing the representation required by our Constitution.

III. CASENOTES

The following casenotes summarize decisions released in August, September, and October, 2002. The Casenotes were written by Don Bronstein, Esq, Murray Kohn, Esq. and David Nathanson, Esq. (Always Shepardize, and check for any modifications by further appellate review.*)* We are grateful for their time, hard work, and contribution.

ADMISSIONS AND CONFESSIONS: FRUIT OF THE POISONOUS TREE; MIRANDIZED STATEMENT AFTER ILLEGAL SEARCH

See *Commonwealth v. DaSilva*, 56 Mass. App. Ct. 220 (2002), summarized at ***SEARCH AND SEIZURE: REASONABLE SUSPICION; GANG ACTIVITY UNCONNECTED TO DEFENDANT HELD INSUFFICIENT***

ADMISSIONS AND CONFESSIONS: IMPERMISSIBLE PROMISE FROM POLICE IN ORDER TO OBTAIN CONFESSION

See *Commonwealth v. Nelson*, 55 Mass. Ct. 911 (2002), summarized at ***PRACTICE, POST-CONVICTION: NEW TRIAL MOTION; NEWLY-DISCOVERED EVIDENCE***.

ADMISSIONS AND CONFESSIONS: MIRANDA; NON-CUSTODIAL INTERROGATION

The defendant was convicted of second degree murder as a joint venturer based, in part, on statements given to police. *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677 (2002). (The extensive facts are summarized at ***CRIMES: MURDER; JOINT VENTURE; SUFFICIENCY***.) The defendant's motion to suppress the statements, where there had been no Miranda warnings given, was properly denied because the defendant was not in custody at the time of the interrogation. There are four factors to be considered in determining whether custodial interrogation has occurred, *i.e.*, whether a reasonable person in the defendant's position would have believed that he was in custody. First, the place of interrogation, the defendant's home, into which the defendant had invited the police, was not inherently coercive. Second, while the police may have considered the defendant a suspect, they did not convey that suspicion to the defendant. Third, the nature of the interrogation was not aggressive or accusatory. Fourth, the defendant was free to end the interview, as evidenced by the fact that he escorted the police to the door at the end and was not arrested until one week later.

ADMISSIONS AND CONFESSIONS: MIRANDA; THREE-HOUR LAPSE BETWEEN WARNINGS AND QUESTIONING HELD PERMISSIBLE

The defendant was convicted of first degree murder for shooting his wife. Prior to the shooting, the defendant engaged in elaborate preparation. On the day of the shooting, he took their children to a carnival. He buckled the children into the car, went back into the house, shot his wife three times, then left with the children for the carnival. When he returned home, he "discovered" his wife's body and called the police. The police arrived at 6 p.m. and Mirandized the defendant, who said he wanted to help the police. At 8 p.m. he voluntarily accompanied the police to the station. At 9 p.m. the police Mirandized him again and took a statement from him in which he denied any involvement in the shooting. At 2 a.m. they again Mirandized him, after which he gave them his clothes and a hair sample. At 4:45 a.m., the police conducted a second interview. The police did not re-administer the Miranda warnings, but asked the defendant if he recalled the rights explained to him earlier (he did) and said that those rights "still apply." During that interview, the defendant broke down and cried and admitted shooting his wife. *Commonwealth v. Sirois*, 437 Mass. 845 (2002). The defendant challenged the failure to suppress his statement on the basis that the confrontational nature of the 4:45 a.m. interview and the significant lapse of time between Miranda warnings rendered his statement not knowing and not intelligent. The SJC held that, in the circumstances, the lapse of time was not so significant as to require suppression. The police had twice advised the defendant of his rights and the police, immediately before the questioning at issue, confirmed that the defendant understood the previous warnings.

ADMISSIONS AND CONFESSIONS: RIGHT TO CONTINUE QUESTIONING AFTER FAMILY MEMBER INFORMS POLICE THAT COUNSEL WILL BE RETAINED FOR DEFENDANT

The defendant's conviction of second degree murder had been affirmed on direct appeal, and his first new trial motion had been denied. Following the SJC's decision in *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000), the defendant filed a second new trial motion, claiming that his statement should have been suppressed because his uncle had told the police officer that the family would be retaining an attorney for the defendant, and the police did not so inform the defendant. *Commonwealth v. Nelson*, 55 Mass. App. Ct. 911 (2002). The Appeals Court concluded that denial of the second new trial motion was proper because *Mavredakis* does not require the police to inform the defendant that a third party intends to retain legal counsel for the defendant. Rather, *Mavredakis* only requires that the defendant be informed when an attorney, who has identified himself or herself as the defendant's counsel, is attempting to render assistance. Moreover, *Mavredakis* did not announce a new constitutional right, and so any claim under it was waived by failing to raise it on direct appeal and in the first new trial.

APPELLATE PRACTICE: CHARGES CONTINUED WITHOUT A FINDING AND DISMISSED HELD NOT MOOT BECAUSE OF COLLATERAL CONSEQUENCES

See *Commonwealth v. Villalobos,* 437 Mass. 797 (2002), summarized at ***GUILTY PLEA: IMMIGRATION WARNING HELD INSUFFICIENT FOR CONTINUANCE WITHOUT A FINDING.***

APPELLATE PRACTICE: INEFFECTIVE ASSISTANCE; CLAIRVOYANCE NOT REQUIRED

The defendant was convicted of breaking and entering in the nighttime with intent to commit a felony. The model instruction given at his trial was erroneous because it failed to make

clear that, in order to convict him, the jury had to find that the defendant possessed the intent to commit the felony inside the dwelling at the time of the break. *Commonwealth v. Poff*, 56 Mass. App. Ct. 201 (2002). (The facts are summarized at ***JURY INSTRUCTIONS: BREAKING AND ENTERING WITH INTENT TO COMMIT A FELONY; STANDARD INSTRUCTION HELD ERRONEOUS***.) Appellate counsel argued that trial counsel was ineffective for failure to object to the instruction. But the Appeals Court rejected the argument because the first time the instruction had been criticized was in *Commonwealth v. Randall*, 50 Mass. App. Ct. 26, 29 (2000), a case decided after the defendant's trial. The court noted that trial counsel was not required to be "clairvoyant" and anticipate the decision in *Randall.* The court cited the infamous *Commonwealth v. Amirault*, 424 Mass. 618, 639 (1997) for this proposition. Fortunately, for the defendant, the court found a substantial risk of a miscarriage of justice.

PRACTICE TIP: This is an incorrect mixing of the clairvoyance doctrine with ineffective assistance. Resist attempts to do this. Clairvoyance is a specific exception to the rule of waiver, *not* a way to defeat a claim of ineffective assistance. The crux of the clairvoyance doctrine is that an error is not waived where the theory underlying the asserted error was "not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case." *Commonwealth v. Rembiszewski*, 391 Mass. 123, 126 (1984). If, as the Appeals Court says, *Poff's* trial counsel had to be clairvoyant to anticipate the error, then the error should have been analyzed as a fully preserved error, not for a substantial risk of miscarriage of justice.

APPELLATE PRACTICE: INTERLOCUTORY APPEALS; ATTORNEYS FEES

See *Commonwealth v. Gonsalves,* 437 Mass. 1022 (2002), summarized at ***INTERLOCUTORY APPEALS: ATTORNEYS FEES***.

APPELLATE PRACTICE: NEW TRIAL MOTION DENIAL; "REFUSAL TO ACT" ON MOTION; APPEAL FROM RULING OF SINGLE JUSTICE

After his conviction for first degree murder was affirmed on direct appeal, the defendant filed a pro se motion for a new trial, raising a claim of ineffective assistance of trial counsel and other claims. After finding that all the claims except that of ineffective assistance could have been raised at trial and on direct appeal, the motion judge issued an order denying the ineffective assistance claim and "refusing to act" on all the other claims. *Weaver v. Commonwealth,* 437 Mass. 1028, 1029 (2002). Twelve years later, the defendant, after inquiring and learning the disposition of the motion, moved to vacate on grounds of lack of notice, on which the trial judge issued an order "refus[ing] to act." The defendant then filed a "petition in the nature of mandamus" in the single justice session of the SJC, seeking an order requiring a different judge to either expressly allow or deny the motion to vacate, on grounds that the motion judge's refusal to act denied him the opportunity to appeal his ineffective assistance claim. The single justice denied the petition. The defendant appealed from the single justice's ruling to the full bench of the SJC, asking the Court to vacate the trial court's order refusing to act on the motion for a new trial.

In denying relief, the SJC ruled that the single justice did not commit an abuse of discretion or error of law. The Court held that mandamus relief is an extraordinary remedy that lies "only to prevent a failure of justice where there is no alternate remedy," and ruled that the trial judge's order "refusing to act" was in effect a final order, from which the defendant "could have sought leave to appeal from the single justice, pursuant to G.L. c. 278, Section 33E." *Id* at 1029. The Court did not reach defendant's request that it vacate the trial court's disposition refusing to action on his original motion for a new trial, on grounds that that request had not been brought before the single justice. *Id. at 1001.*

PRACTICE TIP: The provisions of *Commonwealth v. Curtis,* 417 Mass. 619, 635 (1994), state that a trial judge may "decline to exercise his discretion to open up an issue" first raised in a motion for a new trial filed after direct appeal. Some judges, relying on these provisions, issue rulings on post-appeal motions for a new trial stating that they 'refuse to take action' or 'decline to rule' on the motion. As the *Weaver* case makes clear, the appellate courts will treat such a ruling simply as a denial of the motion and therefor appealable.

APPELLATE PRACTICE: NEW TRIAL MOTION; JURY INSTRUCTIONS; INEFFECTIVE ASSISTANCE; WAIVER OF CLAIMS

In *Commonwealth v. LaPointe*, 55 Mass. App. Ct. 799 (2002) summarized below at ***JURY INSTRUCTIONS: HOMICIDE; THIRD PRONG OF MALICE; MENTAL IMPAIRMENT AND INTOXICATION,*** after the defendant's conviction for second-degree murder was affirmed he filed two *pro se* motions for a new trial, which were denied. The defendant claimed for the first time in the second new trial motion that there had been an error in jury instructions on the third prong of malice for including "grievous bodily harm" language, and that his trial and appellate counsel had been ineffective in failing to challenge the instruction on the trial and appellate levels. The motion judge ruled that the error was harmless, on grounds that the evidence, which showed that the defendant had stabbed the victim in chest, did not warrant a finding of less than a plain and strong likelihood of death. On appeal, the Court ruled that the claim was waived, because, at the time of his direct appeal, the inclusion of "grievous bodily harm" in a jury instruction on third-prong malice had already been held to be error in *Commonwealth v. Sires,* 413 Mass. 292, 303-304 n.14 (1992), so that the defendant's appellate counsel could have raised the claim on direct appeal, and could have claimed ineffective assistance of trial counsel in failing to object to the instruction. *LaPointe*, 55 Mass. App. Ct. at 804-805. The court also ruled that the claim of ineffective assistance of appellate counsel could have been raised in the first motion for a new trial, and that such failure would not be excused because, although filed by the defendant pro se, the motion had contained a different challenge to the jury instructions, and so "indicated … an awareness" that failure to claim an error in jury instructions could constitute ineffective assistance of appellate counsel. *Id.* at 804. The court went on to rule that the waived claim presented no substantial risk of a miscarriage of justice, for the same reason stated by the motion judge. *Id.* at 804-806.

APPELLATE PRACTICE: NEW TRIAL MOTION; NEWLY-DISCOVERED EVIDENCE; WAIVER OF CLAIM

In a motion for new trial, the defendant claimed that his confession had been obtained by an improper promise from the police that he would receive a two-year sentence if he confessed to murder. The Appeals Court agreed with the trial judge that this claim was not timely and had been waived since the evidence was not newly discovered. *Commonwealth v. Nelson*, 55 Mass. App. Ct. 911 (2002).

APPELLATE PRACTICE: NEW TRIAL MOTION; RECONSTRUCTION OF RECORD

The original trial transcript contained many gaps as a result of inaudible portions of the tape of the juvenile court proceedings. After counsel and the trial judge undertook efforts to reconstruct, a better transcript was produced, but the juvenile moved for a new trial claiming that the record was still insufficient to present his appellate claims. *Commonwealth v. Jaime J.*, 56 Mass. App. Ct. 268 (2002). The Appeals Court held that the new trial motion was properly denied and that the entire record, including the original transcript, the reconstructed transcript, and the audio recordings (which the Appeals Court listened to) was adequate.

APPELLATE PRACTICE: ***POST-VERDICT MOTION FOR MISTRIAL CONSTRUED TO BE RULE 30 OR RULE 25 MOTION***

After a post-verdict poll of the jury revealed extraneous influences, trial counsel moved for a mistrial. The Appeals Court construed the motion to be a motion for a new trial under Mass. R. Crim. P. 25 or 30. *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253 (2002). (The rest of the facts are summarized at ***PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FACTS NOT IN EVIDENCE.***) Making matters worse, the defendant did not purport to appeal from the denial of that motion. Arguably, issues presented only by the misnamed motion for a mistrial would be waived in further proceedings.

PRACTICE TIP: Denied Rule 30 motions and Rule 25 motions must be appealed separately and then (normally) consolidated by the Appeals Court. Failure to file individual notices of appeal for both the conviction and the post-conviction motion can have disastrous consequences, so be sure to do this. Further, CPCS performance standards require that, prior to filing a Rule 30 motion, private assigned counsel *must* seek prior approval from the Chief Counsel's designee (Attorney Donald Bronstein of the Criminal Appeals Unit, Private Counsel Division). If you are filing a Rule 25 motion (which does not require approval), you might consider noting in the motion that you do not want it to be construed as a Rule 30 motion.

APPELLATE PRACTICE: PRODUCTION OF TRANSCRIPT; FIFTEEN-MONTH DELAY HELD NOT A VIOLATION OF DUE PROCESS

The defendant, convicted after a three week trial, filed a G.L. c. 211, §3 petition to expedite preparation of the transcript or, in the alternative, stay his sentence if the transcript was not produced within thirty days. *Kartell v. Commonwealth*, 437 Mass. 1027 (2002). While the petition was pending, the transcripts were produced, but appellate counsel claimed that the fifteen month delay violated due process. The SJC rejected the claim, holding that the defendant had made no showing of how the passage of time hindered his ability to present or the court's ability to decide the issues.

PRACTICE TIP: Although counsel did not succeed in having the indictments dismissed because of the delay, the transcripts were produced after he filed the motion to produce them or stay his client's sentence. Appellate attorneys often feel that they are at the mercy of court reporters. But the alternative request for a stay of conviction is a good example of how we can bring some pressure to bear. One might even get the stay in the right case.

APPELLATE PRACTICE: PRODUCTION OF TRANSCRIPT; LOSS OF JURY EMPANELMENT TAPE; NO PREJUDICE FROM DELAY

The defendant, convicted of first-degree murder, asked the SJC to promulgate a rule requiring the immediate preparation of transcripts in first-degree murder cases. The SJC declined to do so. Although the tape recording of the first day of jury empanelment was lost, the supposedly "uneventful" proceedings of that day were reconstructed. Thus, the SJC said that there was no prejudice to the defendant. *Commonwealth v. Dagenais*, 437 Mass. 832 (2002).

APPELLATE PRACTICE: RETROACTIVITY

In *Commonwealth v. Ramirez,* 56 Mass. App. Ct. 317 (2002), summarized at ***SEARCH AND SEIZURE: STRIP SEARCH; PROBABLE CAUSE,*** the defendant, relying on the decision in *Commonwealth v. Thomas*, 429 Mass. 403 (1999), appealed the denial of his motion to suppress contraband seized during a strip search. The Appeals Court ruled that, assuming *Thomas* announced a new rule of law, the defendant was entitled to rely on that case because (1) his case was pending on direct appeal when *Thomas* was decided, and (2) the issue was

preserved by the defendant's motion to suppress. *Ramirez,* 56 Mass. App. Ct. at 322-323. The Appeals Court rejected the Commonwealth's claim that, because the defendant's flight on the second day of trial had resulted in a 13 month delay in the commencement of appellate proceedings, the defendant should not be permitted to rely on *Thomas.* The Appeals Court reasoned that "*Thomas* would likely have been decided before the end of those proceedings even if the defendant had stayed where he was supposed to stay until his trial concluded." *Ramirez*, *supra* at 321, fn.4

COMPETENCY TO STAND TRIAL: DISMISSAL OF CHARGES

In *Foss v. Commonwealth,* 437 Mass. 584 (2002), a defendant charged with three counts of indecent assault and battery was found incompetent to stand trial and ordered held in custody of the Department of Mental Retardation on "indefinite probation." After 7 years, the defendant filed a motion to dismiss, claiming that the provisions of G.L. c. 123, §16(f), require dismissal of all charges upon expiration of the parole ineligibility period based on the maximum sentence for the single most serious crime charged, not based on the maximum consecutive sentence for all crimes charged of equal seriousness, as the Commonwealth asserted. The SJC agreed with the defendant, relying on the "plain meaning" of the words of the statute, the practice of the Department of Corrections in interpreting Section 16(f), and upon the legislative intent which, as reflected by an extensive legislative history, showed concern for the civil rights of the mentally ill, and indicated the legislature's intent "to eliminate the highly questionable practice of committing incompetent defendant indefinitely," or for extensive periods, during which pending charges "significantly limited the incompetent defendant's access to treatment by more effective civil means." *Id. at 588-589.*

COMPLAINTS: AMENDMENT; DANGEROUS WEAPON

The Appeals Court found no error in the amendment of an assault by means of a dangerous weapon complaint to include "shod foot" since the additional language was surplus and caused no prejudice. *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635 (2002).

COMPLAINTS: FAILURE TO FILE APPLICATION FOR COMPLAINT; DISMISSAL

After a warrantless arrest and subsequent conviction for possession of a controlled substance with intent to distribute, and a "school zone" violation," the defendant appealed. The defendant's first claim was that no application for a complaint was ever filed, as required under Dist./Mun.Cts.R.Crim.P. 2(a). *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 783-784 (2002). The Appeals Court ruled, however, that "whether or not a formal 'application' was on file", the filing of a detailed police report describing the narcotics investigation and seizure of drugs in the defendant's car and apartment satisfied the requirement of Dist./Mun.Cts.R.Crim.P. 2 (a) that a written statement constituting the basis for the arrest be filed with the clerk-magistrate prior to the issuance of a criminal case commenced by a warrantless arrest. *Id*. at 783-784.

On the defendant's second claim, the Appeals Court ruled that the failure to provide the defendant with a prompt judicial determination of probable cause or admission to bail, in violation of *Jenkins v. Chief Justice of the Dist. Ct. Dept.,*416 Mass. 221 (1993), and Trial Court Rule XI, Uniform Rule for Probable Cause Determination, did not provide grounds for relief because the defendant had failed to demonstrate prejudice in the "subsequent trial and the interference with procedural rights therein" as required by *Commonwealth v. Viverito*, 422 Mass. 228, 231 (1996). The Appeals Court rejected the defendant's claim that he was prejudiced because the police had not measured the school zone until much later, reasoning that the police "in all likelihood" would have taken the measurements prior to any hearing, and also stated (quoting *Viverito* at 231, but without further explanation) that "the purported prejudice had 'little

to do with the evidence adduced at trial.'" *Arias*, 55 Mass. App. Ct. at 785.

The defendant's third claimed was that, because the police had failed to present the clerk-magistrate at the time of the issuance of the complaint with facts showing probable cause for the school zone violation, the trial court had erred in denying his motion to dismiss that charge. The Appeals Court ruled, however, that neither Dist./Mun.Cts.R.Crim.P. 2(a), nor Standard 2:04 of the Dist. Ct. Standards of Judicial Practice requires that, in cases commencing by warrantless arrest, there be a showing of probable cause for *each* charge. Rather, the Court ruled, the showing of probable cause on the primary drug charge, made by filing the police report, was sufficient for issuance of a complaint containing the school zone charge as well.

Finally, the Appeals Court ruled that, despite the error in permitting the police officer to testify (without objection) to his or her conclusory opinion testimony that the drugs seized were "intended for … distribution" (see *Commonwealth v. Tanner,* 45 Mass. App. Ct. 576, 581 (1998)), "because the officer carefully explained that distribution could be inferred from the method of packaging and the location of the drugs, testimony generally admissible … the conclusion was not significantly more prejudicial than the explanation and [so] did not create a substantial risk of a miscarriage of justice." *Id*. at 528-529.

COMPLAINTS: WARRANTLESS ARREST

The defendant claimed on appeal that his trial counsel was ineffective for failing to move to dismiss the complaint because the application for the complaint and the accompanying police report did not establish probable cause. The Appeals Court rejected this argument because there had been a warrantless arrest, and so the determination of probable cause is not relevant to the issuance of the complaint. Unlike the issuance of a complaint where there is no arrest, as to which the defendant is entitled to a "show cause" hearing on probable cause before the clerk or a judge, the issuance of a complaint following arrest is a "pro forma proceeding that does not require the clerk-magistrate to determine whether a crime has been committed." *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635 (2002).

CRIMES: ARMED ROBBERY; JOINT VENTURE; SUFFICIENCY OF THE EVIDENCE

After the jury was unable to reach a verdict on armed robbery and related assault charges, the defendant in *Newman v. Commonwealth*, 437 Mass. 599 (2002), sought review, under G.L. c. 211, §3, of the denial of the motion to dismiss those charges prior to a second trial, on the ground that the evidence at the first trial was insufficient to prove him guilty as a joint venturer. The defendant had been in the back of the store during the robbery and had run out of the store when his co-defendant held up the store. But the Supreme Judicial Court ruled that the evidence was sufficient to prove that the defendant had the requisite knowledge and intent. That Court held that the evidence supported the conclusion that, on the day of the robbery, the defendant and his co-defendant had been riding around in a car with two women who had gotten out of the car and "cased" the store for the robbery, that the car had been parked in a location where it would not be subsequently identified by witnesses to the robbery, that the two men had then loitered near the store until a male customer left, and that the two men had run to the car where the two women were waiting and fled the scene. The Court ruled that, from this evidence, it was reasonable to infer that the two men had reconnoitered at the store awaiting the most opportune time to put the plan into action, that the defendant had waited in the back ready to assist, that the defendant had run from the store in order to divert attention from his co-venturer, and that his flight evidenced consciousness of guilt. Finally, the Court ruled that the jury could infer from the defendant's failure to express shock or dismay once they reached the car, and his failure to separate from his co-defendant and the two women for several days after the robbery, that "all had gone according

to plan …"

The Court also ruled that there was sufficient circumstantial evidence to infer that the defendant knew that his co-defendant had a gun, as was necessary to convict him of armed robbery (*see Commonwealth v Fickett*, 403 Mass. 194, 196-198 (1988)). The Court concluded "that an accomplice so closely associated with the venture could not fail to know what would be the central question in any robbery: how the robbers were to force the … employees to part with the money." *Newman*, 437 Mass. at 604.

CRIMES: ASSAULT BY MEANS OF DANGEROUS WEAPON; SHOD FOOT

The defendant was convicted of assault by means of a dangerous weapon, a shod foot, where the evidence showed that he was "kicking" the driver's side door of a car where the driver was seated, while she was screaming and trying to lock the door. She testified that he was "booting" the car. The Appeals Court concluded that there was insufficient evidence of a dangerous weapon as there was no testimony about the defendant's footwear or, if there was footwear, whether it was being used in a dangerous fashion. There was sufficient evidence of simple assault, however, since the defendant's actions could be considered to imminently threaten a battery. *Commonwealth v. Rumkin*, 55 Mass. App. Ct. 635 (2002).

CRIMES: ATTEMPT TO VIOLATE ABUSE PREVENTION ORDER; SUFFICIENCY OF EVIDENCE

The defendant was under a G.L. c. 209A abuse prevention order when he asked the complainant's schoolmate to beat the complainant up. The schoolmate refused, but told the complaint of the defendant's request. On this evidence the defendant was convicted of violating the provisions of G.L. c. 209A, §1(a) that define committing "abuse" to include "attempting to cause … physical harm." In denying the defendant's motion for a required finding of not guilty, the trial judge adopted a "dictionary definition of attempt," to wit, "to make an effort to do something." *Commonwealth v. Fortier, 56 Mass. App. Ct. 116, 199 (2002).* The Appeals Court held that the Judge erred, and that the correct definition of the attempt provisions of G.L. c. 209A, § 1(a) was "the legal definition of criminal attempt," so that, in order to prove a violation of the attempt provisions of G.L. c.209A, in addition to the three main elements, to wit, (1) the existence of a valid abuse prevention order at the time of the alleged abuse, (2) the defendant's knowledge of the order, and (3) the defendant's intent to violate it, the Commonwealth must also prove that **"(4) the defendant undertook an overt act towards the commission of the physical harm; and (5) the overt act was some undertaking that could reasonably be expected to cause physical harm."** *Id.* at 118 (emphasis added). The Court went on to rule that the evidence of defendant's statement, even coupled with its transmission to the complainant, was insufficient to satisfy the "proximate execution" requirement for legal attempt because his words "did not activate for imminent execution actions which are reasonably certain to effect within close proximity the commission of the substantive crime." *Id.* at 123. In so ruling, the Appeals Court cited the fact that the schoolmate had refused the defendant's request to beat up the complainant. *Id.* at 122.

CRIMES: CHILD SEXUAL ASSAULT; SUFFICIENCY OF THE EVIDENCE, "UNCORROBORATED" CONFESSION

See *Commonwealth v. Villalta-Duarte*, 55 Mass. App. Ct. 821 (2002), summarized at ***EVIDENCE: SUFFICIENCY; SEXUAL OFFENSE; "UNCORROBORATED" CONFESSION***

CRIMES: CONSPIRACY; SUFFICIENCY OF THE EVIDENCE; "CORROBORATION RULE"

The defendant was convicted of conspiracy to commit mayhem and conspiracy to commit assault and battery by means of a dangerous weapon. The facts showed that the defendant had solicited a "hit man" to shoot in the knees the individual who was the target of the conspiracy. The "hit man" had turned out to be a police informant, who had informed on and testified against the defendant. *Commonwealth v. Abdul-Kareem,* 56 Mass. App. Ct. 78 (2002). On appeal, the defendant, claiming that the evidence was insufficient to convict him, invoked the "corroboration rule", which requires "some evidence, besides the confession … that the crime was real and not imaginary." *Abdul-Kareem,* 56 Mass. App. Ct. at 81, *quoting Commonwealth v. Forde,* 392 Mass. 453, 457-578 (1984). The Court noted that "it is doubtful that the corroboration rule applies to statements made in active furtherance of a crime plan" but held that, "even if applicable, the central purpose" of the rule, to preclude conviction based solely on the statement of an "emotionally disturbed person," was met. *Id.* at 81. The Court relied on the testimony of police officers who had monitored a surveillance tape of the solicitation, evidence of the defendant's efforts to purchase a gun and silencer, trips the defendant made with the "hit man" to conduct surveillance of the target, a history of antagonism between the defendant and the target, and evidence that the defendant's "employer" and the target were on opposite sides of a multimillion dollar business lawsuit. *Id.* at 81-82. The Court ducked the question of whether the evidence was insufficient under the "bilateral theory of conspiracy," according to which there could be no conspiracy because the coconspirator "did not intend to participate in the plan but rather to feign participation and expose it." *Id*. at 80, n.3.

CRIMES; DISSEMINATING MATTER HARMFUL TO MINORS; SUFFICIENCY OF THE EVIDENCE

After a jury-waived trial, the defendant appealed his conviction for disseminating matter harmful to minors in violation of G.L. c. 272, § 28, raising two claims of insufficient evidence. The facts were that a group of young boys had encountered the defendant sitting by a lake near his parked car and that he had shown them what they described were "Playboy" magazines. After this was reported, the police eventually seized from the trunk of the defendant's car not Playboy magazines but much more sexually explicit material entitled "Friction," which was introduced into evidence. *Commonwealth v. Sullivan*, 55 Mass. App. Ct. 775 (2002). On appeal, the defendant relied on cases holding that Playboy magazine is neither obscene nor unsuitable to minors and argued that the evidence was insufficient to prove that the material seized from the trunk of his car was the same material the boys had seen. The Appeals Court rejected this claim, on grounds that the magazines the boys described were "strikingly similar to those found in the defendant's possession" and that it could be inferred that the boys, unfamiliar with such material, had used the term "Playboy" merely as a "generic label" for any sexually explicitly material.

The defendant also claimed that the government had failed to prove that the material was "patently contrary to prevailing standards of adults in the county where the offense was committed as suitable material for such minors," as required under G.L. c. 272, §31 (which defines the terms used in G.L. c. 272, §28). As grounds therefor, the defendant relied on the fact that the judge at his bench trial did not live in Hampden County where the incident occurred and that the government had introduced no testimony regarding Hampden County standards for material suitable for display to minors. But the Appeals Court rejected this claim as well, based on its own review of the material, on grounds that "beneath county variations … lies a baseline" and that "no reasonable and disinterested observer anywhere in the Commonwealth would think [the material] suitable for display to children." *Id*. at 781.

CRIMES: DOUBLE JEOPARDY; BREAKING AND ENTERING IN THE NIGHTTIME WITH INTENT TO COMMIT A FELONY AND INDECENT ASSAULT AND BATTERY NOT DUPLICATIVE

In *Commonwealth v. Poff,* 56 Mass. App. Ct. 201 (2002) the defendant was convicted of breaking and entering in the nighttime with intent to commit a felony and indecent assault and battery as the crime he intended to commit. (The facts are summarized a***t JURY INSTRUCTIONS: BREAKING AND ENTERING WITH INTENT TO COMMIT A FELONY; STANDARD INSTRUCTION HELD ERRONEOUS***.) The defendant challenged his consecutive sentences for those crimes as duplicative. Without explanation, the Appeals Court simply held that each of the two offenses contains an element that the other does not, citing *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871).

CRIMES: DRUG OFFENSE; SCHOOL ZONE VIOLATION

See *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 783-784 (2002), summarized at ***COMPLAINTS; FAILURE TO FILE APPLICATION FOR COMPLAINT; DISMISSAL***

CRIMES: DRUG OFFENSE; SUFFICIENCY OF EVIDENCE

There was direct evidence that the accused, a juvenile, had distributed pills to students at her school but, because neither the pills nor a certificate of analysis were introduced at trial, the juvenile claimed the evidence was insufficient to prove that the pills she distributed were Klonopin (also called Clonazepam), a controlled substance. *Commonwealth v. Alisha,* 56 Mass. App. Ct. 311 (2002). But the Appeals Court rejected this argument, ruling that a certificate of analysis was not required and that the circumstantial evidence was sufficient to support an inference that the pills the juvenile distributed were Klonopin. That evidence included the juvenile's statements to a friend that she would be bringing Klonopin pills into school for distribution; that they were in her home by prescription, a fact confirmed by the juvenile's mother, who testified that she had discovered seventeen pills missing; the juvenile's display of pills and an unnamed prescription bottle to other students the next day, which showed that the juvenile carried out her stated intention; the color of the pills described by one of the students as consistent with the pink color described by the juvenile's mother; and the appearance of the letter "K" on those pills (as described by another student) viewed in the light of the physician's testimony that Klonopin pills usually are identified by that letter. *Id.* at 314.

CRIMES: INDECENT ASSAULT AND BATTERY ON PERSON FOURTEEN YEARS OR OLDER; FORCING TONGUE INTO MOUTH

The defendant, who was in his mid-30s, was the stepfather of a friend of the 14-year-old complainant. He was charged with two incidents of indecent assault and battery: one in which he allegedly touched her breast and nipple and the other in which he allegedly kissed her and forced his tongue into her mouth. He was convicted of one and acquitted of the other, but the jury did not specify of which incident he was guilty. On appeal, the defendant argued that the second incident, while "offensive," was not "indecent." The Appeals Court disagreed, holding that the non-consensual touching did not have to involve "private parts" (genital area, buttocks, breasts) in order to be indecent. *Commonwealth v. Castillo*, 55 Mass. App. Ct. 563 (2002). Here, the age disparity, the authority disparity, the surreptitious and secretive nature of the encounter and subsequent conversation, the use of some force (the defendant grabbed the complainant), and the attempt to get the complainant to keep the incident secret all combined to establish the elements of the crime.

PRACTICE TIP: This case should not be over-read to suggest that any non-consensual

incident in which a defendant forces his tongue into a complainant's mouth would constitute an indecent assault and battery. The circumstances listed above clearly were significant to the Court in concluding that the statute does not require that the touching involve "private parts."

CRIMES; MURDER, DELIBERATELY PREMEDITATED FIRST-DEGREE; SUFFICIENCY OF THE EVIDENCE

See *Commonwealth v. Coren*, 437 Mass. 723 (2002), summarized at ***CLOSING ARGUMENT: PROSECUTORIAL MISCONDUCT; MISREPRESENTATION OF THE EVIDENCE***

CRIMES: MURDER; JOINT VENTURE; SUFFICIENCY

Taken in the light most favorable to the Commonwealth, the evidence established that at around 2:00 a.m. the victim drove his car to buy or sell drugs after he received a call from someone. At around 3:30 a.m. witnesses saw two people get out of the back seat of the car and run down the street. Another man, who had been on the driver's side of the car, went around to the passenger side and pulled a man (the victim) out onto the ground. He then threw things from the trunk, went back to the victim lying on the ground, and shot him once. The shooter returned to the trunk and threw more things from it. He then stood over the victim and shot him again. A few seconds later, a brown Toyota, its headlights out, with a flat tire, came down the street the wrong way. Someone in that car said "Come on" to the shooter, who then got into the front passenger side, and the car drove away. After the police found a hubcap on the street where the shooting occurred, they searched the area and found a brown Toyota with a missing hubcap and flat tire. They later noticed a male (the defendant) and female (one Alecia Facey) looking at the Toyota. After these two walked away, the police followed them to Facey's apartment. The police asked the defendant if they had seen him on the street where the Toyota was, and he admitted that they had been there after coming from a store. The police asked the two if they would come to police headquarters to give a statement. The defendant declined, saying that he wanted to speak to his lawyer, but agreed to be interviewed in the apartment without contacting counsel. Facey accompanied the police to headquarters. She initially said that the Toyota was hers and that her car keys were missing. She then said that on the morning of the shooting the defendant told her that the Toyota had a flat tire and that she should tell the police that her keys were missing and to report that her car had been stolen. Three days later, the police went to Facey's apartment and were invited in by the defendant, who took them to the kitchen and closed the door. One of the officers asked the defendant if there was anything he wanted "to get off his chest." The defendant said that he had gone to meet the victim, after the victim had beeped him, to sell him drugs. He was walking toward the victim's vehicle when two masked men jumped out and started firing guns. The defendant then ran. During the interview, the defendant sweated profusely and declined to be tape-recorded. There had been no Miranda warnings given. A later search warrant of the Toyota led to the recovery of a ski mask and a black stocking in a black jacket. *Commonwealth v. Gendraw*, 55 Mass. App. Ct., 677 (2002).

On these facts, the Appeals Court found that there was sufficient evidence of the defendant's participation in the murder as a joint venturer to support his conviction of second degree murder. The Commonwealth's theory was that the defendant was one of three men who lured the victim to a side street in order to rob him. The defendant admitted that he was present at the scene of the murder, and the evidence was overwhelming that the Toyota the defendant had been driving was the same as the one later seen at the scene. This evidence could be seen as tending to show advance knowledge by the defendant of the shooter's plans. The shooter ran straight to the defendant's car after the shooting and drove off. The defendant's conduct after the murder showed consciousness of guilt.

CRIMES: POSSESSION OF A FIREARM; CONSTRUCTIVE POSSESSION; SUFFICIENCY

Convicted of unlawful possession of a firearm, the defendant challenged the evidence of constructive possession. Taken in the light most favorable to the Commonwealth, the evidence was that the defendant and a co-defendant assaulted a person they believed had stolen their drugs. They both used firearms during the assault. After the assault they fled in a car, but the police quickly stopped the car. The defendant fled on foot. The police recovered a gun in plain view "in front of the back seat" where the co-defendant had been sitting. The defendant had been sitting in the front passenger seat. The evidence was sufficient to permit a rational trier of fact to conclude that the defendant had actual or constructive possession of the firearm because: (1) he had easy access to and the ability to exercise control over it, (2) the defendant had just participated in an assault using a firearm. *Commonwealth v. Blevins*, 56 Mass. App. Ct. 206 (2002).

CRIMES: POSSESSION OF A FIREARM WITHOUT A LICENSE; KNOWLEDGE OF FIREARM AND POWER AND INTENT TO EXERCISE CONTROL

The defendant was convicted of several charges, including carrying a firearm without a license. The evidence, taken in the light most favorable to the Commonwealth, showed that he has the driver of an SUV, with three passengers, involved in a high-speed chase by police. After the vehicle was seized, a search resulted in discovery of a backpack which contained a pistol, a paystub issued to the defendant, and a shirt with the logo of the company which was listed on the paystub. On appeal, the defendant argued that there was insufficient evidence to show that he knew that the weapon was in the vehicle or that he had the power and intent to exercise control over the weapon. Such knowledge, power, and intent are essential elements to show constructive possession. Here, the evidence described above, combined with strong consciousness of guilt evidence, was sufficient. *Commonwealth v. Valentin*, 55 Mass. App. Ct. 667 (2002).

CRIMES: POSSESSION OF A STOLEN MOTOR VEHICLE

The defendant was convicted of receiving a stolen motor vehicle. The Appeals Court rejected his argument that he could not be convicted of this crime since the evidence was overwhelming that he was the person who stole the vehicle, and it is settled that a thief cannot be guilty of receiving stolen property which he himself has stolen. *Commonwealth v. McArthur*, 55 Mass. App. Ct. 596 (2002). In this case, the jury was instructed that the statute, G.L. c. 266, 28(a), prohibits possession of a stolen vehicle; a thief can be guilty of possessing a vehicle he has stolen. The evidence demonstrated that the defendant possessed the vehicle. Although he could not have been convicted both of stealing the vehicle and possessing it, here he was not charged with stealing it. The Appeals Court brushed aside the fact that the caption of the indictment read "Receiving Stolen Motor Vehicle" and the fact that the jury returned a verdict of guilty of receiving a stolen motor vehicle, not possession.

CRIMES: RESISTING ARREST; REQUIRED FINDING

A police officer attempted to make a Terry-type stop to inquire of the defendant about a possible drug transaction. The defendant instead got on his bicycle and rode it toward the officer, refusing three additional orders to stop. The officer put out his arm and blocked the defendant's path, causing him to fall. During the ensuing struggle, the officer was not trying to handcuff the defendant, but rather to stop him from leaving. A second officer arrived and sprayed the defendant with pepper spray. The Appeals Court held that these facts were not sufficient to support the conviction of resisting arrest. A stop for the purpose of making a

threshold inquiry under *Terry* is not an arrest. There was no intention here to arrest the defendant and so the resisting arrest statute, G.L. c. 268, § 32B, is not applicable. *Commonwealth v. Smith*, 55 Mass. App. Ct. 569 (2002).

CRIMES: SEXUAL OFFENSE; SUFFICIENCY OF EVIDENCE; "UNCORROBORATED CONFESSION

The defendant was convicted of multiple counts of rape of a child and related offenses based on his statements that he had molested a baby for whom his wife was providing day-care, and had hit the child in the face when she cried. *Commonwealth v. Villalta-Duarte*, 55 Mass. App. Ct. 821 (2002). On appeal he claimed the evidence was insufficient to support his conviction, invoking the rule first enunciated in *Commonwealth v. Forde*, 392 Mass. 452, 457 (1984) that "an uncorroborated confession is insufficient to prove guilt." In *Forde*, 392 Mass. at 458, a murder case, discovery of the corpse of the defendant's missing wife was held to satisfy this corroboration requirement. Citing *Commonwealth v. Costello*, 411 Mass. 371, 374 (1991), for the proposition that "child sexual abuse cases engender special evidentiary problems", the Appeals Court in upholding *Villalta-Duarte*'s conviction relied on the following "corroborating" evidence: the baby "began to cry hysterically when brought into the apartment" while the defendant was there, had developed "an intractable diaper rash, and had scratches on her face", and that these "symptoms … disappeared after a few weeks at [a new day-care] provider's home." *Villalta-Duarte*, 55 Mass. App. Ct. at 826. The Court ruled that this evidence was "sufficient to support an inference that something traumatic occurred in the apartment where the defendant lived," and that that satisfied the requirement that " there be some evidence, other than a confession, that a criminal act was committed by someone." *Id*. The Court also stated that, "although not necessary under Massachusetts cases, the evidence, aside from the confessions, suggests that the defendant was the likely culprit." *Id*. at 826-827.

CRIMES: THREATS TO COMMIT CRIME; INTENT TO COMMUNICATE THREAT; REASONABLE APPREHENSION; SUFFICIENCY

The defendant was sued by her condominium association, enjoining her from interfering with roof repairs. She then began to call and write the attorney for the association. After she lost the Superior Court civil trial, she told the association attorney, "Maybe it's time for me to get a gun." When she failed to pay fees owed to the law firm that represented her during the trial, the firm obtained a judgment against her and hired a collection attorney. In a letter to the association attorney, the defendant then blamed the association attorney for the collection effort, called him a crook and "immensely sick", accused him of extortion and sadomasochism, and said that she had "no further obligation to respect the law." When the collection attorney contacted her fifteen days later, she told him that if the association attorney "continued to torture her . . . she would get a gun. She would shoot him and then she would shoot herself." The defendant believed that the collection attorney and the association attorney were part of a conspiracy to torture her. Although the collection attorney did not know the association attorney, he telephoned the association attorney and informed him of the statements. The defendant testified that she was only "blowing off steam" and expressing "pain and despair." The defendant was convicted of threatening to commit a crime based on statements made to a third party. *Commonwealth v. Meier*, 56 Mass. App. Ct. 278 (2002). Viewing the defendant's comments in the broader context and in the light most favorable to the Commonwealth, the defendant's statements were reasonably interpreted as threats. The defendant had previously threatened to get a gun, her behavior had since become more hostile, she stated that she had no obligation to respect the law and now she threatened to get a gun and shoot the association attorney. The Appeals Court noted

that the conditional nature of the threat does not make it less of a threat. *Commonwealth v. Eliffe*, 47 Mass. App. Ct. 580, 583 (1999).

The court also considered the issue of sufficiency in light of *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 524-28 (2002), which holds that, where threats are made to a person other than the target of a threat, the Commonwealth must prove beyond a reasonable doubt that the defendant intended to have the third person communicate the threat to the target. The evidence, viewed in the light most favorable to the Commonwealth was sufficient to show that the defendant intended that the threat be communicated to the target. The defendant believed that the third person and the target were in league with each other against her. Therefore, evidence was sufficient to show that the defendant intended that her threat reach the target.

CRIMES: THREATS TO COMMIT CRIME; INTENT TO COMMUNICATE THREAT; SUFFICIENCY

The defendant was convicted of threatening to commit a crime against her husband based on her statements to a third party. The defendant repeatedly told a friend that she wanted "something bad" to happen to her husband. She told the friend that she would like to see her husband killed. Later, she asked the friend to "take care of" her husband and make him disappear. The defendant offered the friend both sex and money to kill her husband. The defendant never communicated these remarks directly to her husband nor did she tell the friend to relay them. But eventually the friend did communicate the remarks to the husband. The Appeals Court held that evidence of the defendant's intent to communicate the threat to her husband was insufficient. *Commonwealth v. Furst*, 56 Mass. App. Ct. 283 (2002). Relying on *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 524-28 (2002), and *Commonwealth v. Meier*, 56 Mass. App. Ct. 278 (2002) (summarized above at ***CRIMES: THREATS TO COMMIT CRIME; INTENT TO COMMUNICATE THREAT; REASONABLE APPREHENSION; SUFFICIENCY***). Considered in the light most favorable to the Commonwealth, the evidence showed that the defendant took the friend into her confidence and sought his help as a potential partner in crime, not as one likely to communicate her statements. Although the court held that the evidence of threatening to commit a crime was insufficient, it noted that the more obvious crime that the defendant could have been charged with was soliciting the friend to commit a crime.

CRIMES: UNLAWFULLY CARRYING A FIREARM; SUFFICIENCY OF THE EVIDENCE; LIMITS OF RESIDENCE

The Court held in *Commonwealth v. Coren*, 437 Mass. 723 (2002), that the evidence was not sufficient to convict the defendant of carrying an unlicensed firearm outside of his residence under G.L. c. 269, §10(a), because the evidence showed only that he possessed the gun on the walkway to his home and in the backyard, both of which are within the boundaries of a residence for purposes of the statute. *Id*. at 734-736.

DEFENSES: ALIBI AND MISIDENTIFICATION; IMPEACHMENT FOR FAILURE TO REPORT ALIBI TO AUTHORITIES

The defendant and two others were charged with assaulting the victim. The defense was misidentification and alibi. The defendant and her alibi witness both testified that they were at the defendant's home at the time of the incident. On cross examination, the prosecutor asked the defendant and the alibi witness why each had failed to report this to the authorities. *Commonwealth v. Brissett,* 56 Mass. App. Ct. 862 (2002). The Appeals Court ruled that the judge abused his discretion in allowing the impeachment, because the prosecutor had failed to lay the necessary foundation "by first establishing that [1] the witness knew of the pending

charges in sufficient detail to realize that he possessed exculpatory information, that [2] the witness had reason to make the information available, [3] that [the witness] was familiar with the means of reporting it to the proper authorities, and that [4] the defendant or his lawyer, or both, did not ask the witness to refrain from doing so." *Id.* at 865*,* quoting *Commonwealth v. Brown*, 11 Mass. App. Ct. 288, 296-297 (1981). The Court further ruled that "when, as here, some portion of that period of silence followed the *defendant's* receipt of notice as to [the] complaint against her and her entry of a plea of not guilty … the judge had *no discretion* to permit such cross-examination of the two women." *Brissett,* 56 Mass. App. Ct. at 866 (emphasis added); *citing Commonwealth v. Rivers,* 21 Mass. App. Ct. 645, 647-648 (1986).

The Appeals Court found the error prejudicial and reversed the defendant's conviction, on grounds that, because the government's case rested solely on the credibility of eyewitness testimony, the improper impeachment "struck to the heart of the defense strategy…." The Appeals Court also relied on the lack of physical evidence linking the defendant to the assault and the fact that the jury completely acquitted a codefendant and acquitted the defendant of one of two charges, thereby showing "the jury's apparent willingness to disbelieve portions of the prosecution's testimony." *Brissett,* 56 Mass. App. Ct. at 856.

EVIDENCE: ACCESS TO WITNESS

The defendant was convicted of various sex crimes against his former wife. The couple's sons were nearby when the assaults occurred. Initially, neither party intended to call the children. But four days prior to trial, a Friday, the prosecutor gave notice that the children might testify. Defense counsel arranged for a Saturday interview at the prosecutor's office, but the victim insisted that the defendant not be present at the interview and that the victim witness advocate be present. Defense counsel filed a motion in limine to exclude the children's testimony or for a voir dire because the Commonwealth had prevented reasonable access to the children. After an unrecorded lobby conference, the judge ordered that defense counsel be given the opportunity to interview the children without the defendant present but with the victim/witness advocate present. The judge declined to order that the advocate not discuss the interviews with the prosecutor. *Commonwealth v. Giacobbe*, 56 Mass. App. Ct. 144 (2002).

The defendant argued to the Appeals Court that the judge failed to follow the procedures for dealing with Commonwealth obstruction of access to witnesses that are set out in *Commonwealth v. Carita*, 356 Mass. 132, 142-43 (1969). But the Appeals Court rejected the claim. It was the victim, not the Commonwealth that insisted on the conditions for the interview. Further, the defendant never asked that the children or the mother be brought before the court for the prescribed admonitions regarding a witness' right to consent to or refuse an interview. Nor did the defendant ask for a neutral third party other than the victim witness advocate to attend the interviews. (The court said the idea had "appeal." *Giacobbe*, 56 Mass. App. Ct. at 150.) Because the claims were supposedly raised for the first time on appeal, the court reviewed for a substantial risk of a miscarriage of justice. There was no such risk because the credibility of the witnesses was thoroughly aired at trial and there was nothing in the record to suggest that the victim witness advocate disclosed content of the interviews to the prosecutor (even though they were not privileged).

PRACTICE TIP: Remember to reconstruct the record of lobby conferences, especially if they are relevant to the issues on appeal. Here, one suspects that defense counsel, during the lobby conference, may have discussed his requests for a *Carita* colloquy and for a neutral third party at the interviews. If the record showed those requests, he could have argued for the more stringent preserved error standard of review.

EVIDENCE: AUTOPSY PHOTOGRAPHS ADMISSIBLE TO SHOW COMMONWEALTH'S THEORY OF DEATH

The defendant was convicted of murder in the first degree for killing his ex-girlfriend. The defendant had been dating a co-worker of the victim. He expressed his hatred for the victim and told the new girlfriend of his plan to steal the victim's car, which he did. The victim then rented a car to replace the stolen one. Late one night, the defendant called his girlfriend while very upset, saying the victim had an accident. He explained that some friends of his told him they had abducted the victim to "scare" her. They bound her with duct tape, weighted her down, hung her off a bridge, and dropped her. She hit her head on the side of the bridge and then sank. The defendant denied being involved, wondered whether the friends' story was true, and asked his girlfriend to see if the victim showed up to work the next day. The victim did not return to work, but her stolen car reappeared.

The defendant fled to Florida in the victim's rental car and turned himself in. When the police came to interview him, he claimed that he and the victim had stopped on a high bridge over the Merrimack River to discuss her testimony in two upcoming cases and his failure to dispose of the stolen car for her. The victim sat on the ledge of the bridge. When she refused to testify in his favor in the upcoming cases, he approached her but was not close enough to touch her. Hysterical, she backed up, yelled at the defendant to stay away, lost her grip, and fell into the river. But when the police recovered her body from the river, it was bound with yards of duct tape. Interior layers of the tape preserved a fingerprint from the defendant. The victim's skull was fractured in a manner consistent with a fall from a great height. *Commonwealth v. Dagenais*, 437 Mass. 832 (2002).

The defendant challenged the admission of seven photographs. Five photographs showed the location of the duct tape on the body, one showed the removal of the duct tape by the medical examiner, and one showed the victim's skull with the skin peeled back in order to demonstrate the fracture. Predictably, the SJC held that the admission of the photographs was not an abuse of discretion because they were directly relevant to the Commonwealth's theory of the case. The position and condition of the duct tape impeached the defendant's version of events and showed how the fingerprint was retrieved. The skull photograph was probative of the cause of death. The SJC refused to apply the more stringent standards for autopsy photographs involving alteration of the corpse announced in *Commonwealth v. Bastarache*, 382 Mass. 86, 106 (1980), because the alteration was only to the degree necessary to show the wound.

EVIDENCE: DRUG OFFENSE; OPINION TESTIMONY

See *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 783-784 (2002); summarized at ***COMPLAINTS: FAILURE TO FILE APPLICATION FOR COMPLAINT; DISMISSAL***

EVIDENCE: EXCLUSION OF CROSS-EXAMINATION OF CO-DEFENDANT ON EFFECT OF WOODWARD TRIAL ON DECISION TO TESTIFY

The co-defendant in a first degree murder prosecution arranged to plead guilty to manslaughter and testify against the defendant. The defendant sought to cross-examine her on the effect of the Louise Woodward trial, which was in the news at that time, on her decision in light of the similarities between the witness and Louise Woodward, which might have caused even an innocent person to plead guilty rather than risk a trial. The SJC affirmed the trial judge's exclusion of this questioning and concluded that there was no improper limitation of the right of confrontation since there had been extensive cross-examination of the witness as to bias and credibility, and the questions about the Woodward verdict were "minimally relevant but highly inflammatory." *Commonwealth v. Knight*, 437 Mass. 487, 495 (2002).

EVIDENCE: EXPERT OPINION; OPINION THAT DRUGS INTENDED FOR DISTRIBUTION; OPINION THAT EVIDENCE WAS CONSISTENT WITH DISTRIBUTION

In a drug prosecution, a police officer, who was not involved in the surveillance or arrest of the defendant, testified as an expert that, taking all the circumstances into account, the drugs were intended for distribution. *Commonwealth v. Lopez*, 55 Mass. App. Ct. 741 (2002). This testimony was improper since it was an opinion about the ultimate issue which the jury had to decide, but the prosecutor quickly had the officer correct his testimony by stating that the circumstances were "consistent" with distribution. Since the officer was not a percipient witness and his testimony explained things to the jury which were likely to lie outside their experience, the trial judge did not abuse discretion in allowing the witness to correct his improper statement.

EVIDENCE: EXPERT OPINION; PROFILE OPINION; CHILD ABUSER

The defendant was convicted of rape of a child under sixteen (his stepdaughter), assault with intent to commit rape on the same child, and indecent assault and battery of the stepdaughter. *Commonwealth v. Poitras*, 55 Mass. App. Ct. 691 (2002). The Appeals Court reversed the convictions as a result of testimony, which had been objected to, from the prosecution's expert (a psychologist) on sexual abuse of children, which constituted improper profile opinion about attributes and characteristics of those most likely to abuse children. That testimony closely mirrored the prosecution's evidence about the defendant. The expert had testified that a child abuser is often an adult known to the child, in a position of authority, and who is a caregiver with access and opportunity to engage the child. Moreover, the expert testified that the abuser is often one who is not dating anyone and therefore without access to a partner and that the child is often vulnerable as a result of a "disrupted attachment relationship." Each of these factors applied to the defendant and the complainant. Here, the error in admitting this testimony was prejudicial because the Commonwealth's case was not strong and the issue of guilt turned on the complainant's credibility.

EVIDENCE: EXPERT OPINION; REASONABLE DEGREE OF MEDICAL CERTAINTY

In a first degree murder prosecution, the defense presented an expert forensic psychologist to support his claim that he lacked the specific intent to kill or commit robbery. The defendant objected that the prosecutor failed to ask the expert whether the opinions brought out on cross-examination were based on a "reasonable degree of medical certainty." *Commonwealth v. Rodriguez*, 437 Mass. 554, 562-63 (2002). But the SJC concluded that there was no error because the expert's "answers to the questions conformed to the 'consistent with' and 'could have' language expressly condoned" in *Commonwealth v. Nadworny*, 396 Mass. 342 (1985).

EVIDENCE: GANG MEMBERSHIP

Following a high-speed chase, the defendant, a passenger in the car being pursued by police, jumped from the car, threw a gun in the bushes, and was eventually convicted of illegal possession of a firearm. *Commonwealth v. Philyaw*, 55 Mass. App. Ct. 730 (2002). Prior to trial, the prosecutor informed the judge that she planned to ask the police why they had followed the defendant. The anticipated answer was that the defendant "hung out" in an area where "kids" had a problem with "kids" in the project and that the car in which the defendant was riding was headed toward that project. The judge ruled that this testimony would be admissible but that there should be no mention of gangs. The word "gang" was not used at trial. Rejecting the defendant's claim that there were improper insinuations of gang membership, the Appeals Court held that the reference to youths having a feud with other youths was relevant so as not to put the

police in the false position of seeming to have just happened on the scene and also to support the critical issue of identification.

EVIDENCE: HEARSAY; EXCITED UTTERANCE; ADMISSIBILITY WHEN STARTLING EVENT ELICITS STATEMENT CONCERNING A PRIOR EVENT

The defendant was convicted of indecent assault and battery on a child under the age of fourteen years, his girl-friend's daughter, but was acquitted of rape of a child brought on a theory of penile penetration. On appeal, the defendant claimed that a statement made by the victim's mother to the police at the time of his arrest was improperly admitted as an excited utterance. *Commonwealth v. Santiago*, 437 Mass. 620 (2002). At trial, a police officer had testified that the mother upon seeing the defendant being arrested, had run over "very, very upset and agitated" and "speaking rapidly and loudly", *id*. at 625, cried out that the defendant had told her that he "went into [the victim's] bedroom and kissed her … only put his finger in her vagina, but did not have intercourse [with her]." *Id*. at 622.

The Supreme Judicial Court held that the admissibility of an excited utterance "where the startling event elicits a statement concerning some prior event," depends on "the nexus between the startling event, the excited utterance generated by it, and the prior event about which the declarant comments to determine whether the statement was made without reflection." *Id*. at 627. The Court stated that "the relationship must be such that the occurrence of the subsequent event (here, the arrest) is likely to produce a nonreflective exclamation about the prior event (here, the defendant's statement to her)", and also required (as with every excited utterance) that the "declarant display a degree of excitement sufficient to conclude that her statement was a spontaneous reaction to the exciting event, rather than the product of reflective thought." *Id*. at 625-626.

The SJC went on to rule that the test was satisfied. The Court found that the mother in making the statement displayed sufficient excitement, that there was a strong connection between the arrest and the statement because "it was precipitated by the mother's perception that the arrest was unjustified because she thought the defendant had committed no crime," and that there was also a strong connection between the exciting event and the underlying event related in the statement because "[t]he defendant's arrest … was for the very crimes for which he was facing trial in this case, and the mother's utterance, prompted by the arrest, concerned those crimes." *Id*. at 627. (Note that the excited utterance contained a second-level of hearsay, the declarant's boyfriend's statement, which was admissible as an admission of the defendant. *Id*. at 627, n.4).

EVIDENCE: HEARSAY; EXCITED UTTERANCE; INADMISSIBLE WHEN STATEMENT WAS PREMEDITATED

After the alleged victim was beaten by her live-in boyfriend, "she was too frightened to leave the apartment that day, but she did form a plan to do so." *Commonwealth v. Dunn,* 56 Mass. App. Ct. 89, 90 (2002). First she had family members come and remove her belongings from the apartment. The next day, as part of the plan, she bicycled with the defendant to the office of the housing agency that subsidized their apartment, ostensibly to drop off verification of her income, and went into the office while the defendant remained outside to watch their bicycles. Inside the office, she "appeared hysterical," and her right eye appeared badly bruised. *Id.* at 91. She reported the beating and asked to have the police called. When the police promptly responded, they found her "crying and shaking." She told them about the beating, her fear of the defendant, and her escape plan, after which the police went outside and arrested the defendant. *Id.* After being convicted of kidnapping and assault charges, the defendant appealed,

claiming that the judge erred in admitting into evidence the statements made by the alleged victim at the housing office under the "excited utterances" exception to the hearsay rule. The Court agreed, citing the principles that, for the exception to apply, the statement "must have been spontaneous to a degree which reasonably negated premeditation or possible fabrication" and that "the exception is unavailable not only when premeditation or fabrication is actually shown but also when the statement's proponent fails to reasonably negate the presence of either." *Id.* at 93. The court relied on the fact that "notwithstanding the violence's impact on [the alleged victim's] thinking processes, [the alleged victim] made her statements as part of a … preconceived component of an escape plan and not as an essentially spontaneous reaction to the event itself." *Id.* at 93-94. Nevertheless, the court went on to rule the error harmless, on grounds that the statement was merely cumulative of the alleged victim's testimony at trial which, along with photographs of the alleged victim's injuries and the officers' testimony about her demeanor, made for a "very solid [Commonwealth's] case." *Id.* at 94-95.

EVIDENCE: HEARSAY; EXCITED UTTERANCE; OUT-OF-COURT IDENTIFICATION

The defendant appealed his conviction for assault and battery of his girlfriend, who did not testify at his trial and who was not shown to be unavailable, claiming that her out-of-court statement identifying him as her assailant should not have been admitted under the excited utterance exception to the hearsay rule. *Commonwealth v. Ivy*, 55 Mass. App. Ct. 851 (2002). The Appeals Court ruled that the girlfriend's response to questions by the officer at the hospital emergency room were admissible as excited utterances, because they had been made 4 ½ hours after the alleged assault while the victim was "curled in a fetal position and whimpering [with] her right eye red and swollen [while she] appeared frightened and exhausted from crying" *Id*. at 853, and so "was spontaneous to a degree which reasonably negated premeditation or possible fabrication …" *Id.* at 854.

The defendant also claimed that the statement failed to satisfy the requirements of *Commonwealth v. Daye,* 393 Mass. 55, 61-62 (1984), which allows an extrajudicial identification to be admitted under the prior-inconsistent-statement exception to the hearsay rule provided that the identifying declarant testifies at trial, is subject to cross examination, and acknowledges the prior identification. *Id.* at 61. But the Appeals Court, relying on *Commonwealth v. Medrala,* 20 Mass. App. Ct. 398, 401 (1985), distinguished *Daye,* on grounds that it involved a different hearsay exception than the one under which the girlfriend's statement had been admitted.

In an issue of first impression, the defendant also claimed that admitting the out-of-court identification as substantive evidence under the excited utterance doctrine violated his confrontation rights under the state and federal constitutions because the Commonwealth was not required to produce the identifying declarant and was not required to demonstrate that the witness was unavailable. *Ivy,* 55 Mass. App. Ct. at 856. The Appeals Court rejected this claim as well. Relying heavily on decisions which upheld excited utterances (but not extrajudicial identifications) against a similar constitutional challenge, the Court reasoned that "a statement that qualifies for admission under a firmly rooted hearsay exception is so trustworthy that adversarial testing can be expected to add little to its reliability", and that requiring a showing of unavailability "would have few practical benefits while imposing pointless litigation costs …" *Id*. at 858-859, *quoting White v. Illinois*, 502 U.S. 346, 353-358 (1992); c*ited with approval in Commonwealth v. Whelton,* 428 Mass. 24, 28-29 (1998). The Court also stated that "[m]oreover, in this case, the reliability of the victim's identification was corroborated by independent evidence," including the defendant's testimony admitting to having had an argument with the victim at their apartment during the evening, the victim's physical injuries the next morning, and the impeachment of the defendant's alibi. *Id.* at 859-860.

PRACTICE TIP: This case does not necessarily stand for the admissibility of every out-of-court identification offered as the excited utterance of a non-testifying witness not shown to be unavailable. Normally, an out-of-court identification is only admissible substantively where the witness is available for cross-examination. *See*, *e.g., Commonwealth v. Pasko,* 391 Mass. 164, 171 n.8 (1984). Indeed, it is was held in *Commonwealth v. Kirk*, 39 Mass. App. Ct. 225, 230-231 (1995), that a conviction based on an extrajudicial identification by a nontestifying witness not shown to be unavailable violates the defendant's right to confrontation. The *White* and *Whelton* cases, which held that admitting excited utterance hearsay of a non-testifying witness without a showing of unavailability did not violate the Confrontation Clause, did not involve an out-of-court identification. Despite the *Ivy* Court's decision, there is no "firmly rooted exception to the hearsay rule" that applies specifically to the admission of an extrajudicial identification. And in *Mandrala* the witness whose excited-utterance identification was held admissible testified and was available for cross-examination.

In moving to exclude such an extrajudicial identification, you can argue that it is within the judge's discretion to exclude any evidence offered under a hearsay exception that lacks sufficient indicia of reliability. You can distinguish *Ivy* on grounds that the Appeals Court relied on strong independent evidence tending to show the identification was reliable. *Ivy*, 55 Mass. App. Ct. at 859-860. You may also argue that the same excitement that tends to negate premeditating or fabricating a spontaneous utterance may also tend to undermine the accuracy of the identification. *See Commonwealth v. Pressley,* 390 Mass. 617, 620 (1983) (a witness may "honestly have been mistaken" in making an identification).

EVIDENCE: HEARSAY; IMPROPER REFERENCE TO FACT THAT DEFENDANT'S CAR WAS STOPPED IN CONNECTION WITH UNRELATED ARMED ROBBERY

Following a high speed chase, the defendant was convicted of carrying a firearm without a license, operating a motor vehicle negligently, and failing to stop for a police officer. At trial, the judge instructed the prosecutor not to elicit any testimony regarding any out-of-state warrants. Nonetheless, the police officer testified that the SUV in which the defendant had been either driving or a passenger had been stopped initially because of a report that it had been involved in an armed robbery that evening in Rhode Island. *Commonwealth v. Valentin*, 55 Mass. App. Ct. 667 (2002). The Appeals Court agreed with the defendant that this testimony was inadmissible hearsay since the only purpose for which it was admissible, to explain why the vehicle had been stopped, was not an issue in the case and there was, in addition, no reason to refer to the armed robbery. But apparently the evidence had not been objected to (though a curative instruction was requested and given), and there was no substantial risk of a miscarriage of justice since the Commonwealth's evidence was strong, the prosecutor made no reference to the inadmissible testimony in closing, and the judge gave a "strong" curative instruction. *Id*. at 674.

PRACTICE TIP: The Appeals Court noted that it did not "condone the prosecutor's eliciting the testimony. We caution prosecutors to properly prepare witnesses' testimony to avoid this type of error…[I]t is expected that a prosecutor who is aware that a police witness might allude to inadmissible prejudicial evidence will take affirmative steps to ensure that such testimony does not come before the jury." *Id*. at 675. The Court's displeasure with the prosecutor suggests that the result might have been different if there had been timely objection at trial.

EVIDENCE: LOSS OF POLICE REPORT

The defendant was charged with sexually abusing teens in the early 1970's. During the contemporaneous investigation, other teens accused the defendant of sexual abuse, but the

complainant denied any abuse. The defendant moved to Canada and remained there until in 1994, when he was extradited as a result of the reopened investigation. In the intervening twenty years, the police lost the police reports including the one containing the complainant's initial denial.

Although the police were negligent for losing files in an open case, there was no bad faith. The defendant also bore responsibility for the loss from delay because of his flight. The Appeals Court ruled that there was no prejudice to the defendant especially because the complainant acknowledged at the hearings regarding the loss of evidence that he initially denied being abused. *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253 (2002). (The remaining facts are summarized at ***PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FACTS NOT IN EVIDENCE.***)

EVIDENCE: OPINION EVIDENCE; DRUG OFFENSE

See *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 783-784 (2002), summarized at ***COMPLAINTS; FAILURE TO FILE APPLICATION FOR COMPLAINT; DISMISSAL***

EVIDENCE: PRIOR CONSISTENT STATEMENTS

A co-defendant testified against the defendant at his first degree murder trial that, before she was arrested, she had told her father: "I was in big trouble, that I was there when Eddie killed someone" and also that she told a friend: "Eddie killed somebody and that I was there." The SJC found the admission of these prior consistent statements proper, even though they were admitted on direct examination in the Commonwealth's case, as a defense claim of recent contrivance was inevitable and necessary. It did not matter that the trial judge failed to give a limiting instruction of the time the co-defendant testified since the instruction was given when the friend testified and in the jury charge. *Commonwealth v. Knight*, 437 Mass. 487 (2002).

EVIDENCE: PRIOR CRIMINAL RECORD OF DEFENDANT

In a first degree murder prosecution, the defense was lack of criminal responsibility. On cross-examination by the prosecutor, the defense neuropsychologist testified about antisocial personality disorder**.** On redirect, defense counsel attempted to demonstrate that the doctor had not diagnosed the defendant with this disorder, but the witness testified that he had "noted antisocial tendencies" in part from this case and in part from the defendant's "criminal history." Over objection, the prosecutor on recross elicited that the defendant had acknowledged "a long history of trouble with the law" and a five-year sentence for armed robbery. Because the defense had "opened the door," the SJC concluded that the prosecutor was entitled to explore the criminal history in more detail. *Commonwealth v. Torres*, 437 Mass. 460 (2002).

GUILTY PLEA: IMMIGRATION WARNING MODIFIED FOR CONTINUANCES WITHOUT A FINDING

In *Commonwealth v. Villalobos*, 437 Mass. 797 (2002), the defendant admitted to sufficient facts and his case was continued without a finding (CWOF). During the colloquy, the judge gave the standard immigration warning, pursuant to G.L. c. 278, §29D. This warning advises the defendant that a *conviction* may have three specified immigration consequences. Because his cases were continued without a finding and eventually dismissed, the defendant was never convicted under Massachusetts law. *But under immigration law, a CWOF is a conviction!* The INS moved to deport the defendant, so the defendant moved to withdraw his admissions under §29D. He asserted that he had been misled by the warning. If he knew that the CWOF would be considered a conviction, he would have gone to trial.

The SJC rejected the Commonwealth's argument that the case was moot because the

charges were dismissed. They noted that dismissing the appeal as moot would be inappropriate because of the serious collateral consequences and the unique purpose of §29D. Then, the Court agreed that the warning was inadequate and potentially misleading. The Court recommended that judges warn defendants that CWOFs as well as convictions can have the immigration consequences identified in §29D. The Court also suggested model language for the modified warning.

But here, the SJC ruled (over Justice Ireland's dissent) that the defendant was warned in conformity with the statute, so he was not entitled to withdraw his plea under §29D. Further, the failure to warn the defendant of collateral consequences did not render his admissions involuntary. However, the court was careful to hold out the possibility that in some cases the failure to adequately warn that CWOFs can result in immigration consequences could render the admissions involuntary.

PRACTICE TIP: When moving to withdraw guilty pleas under §29D, make sure to include *all* other meritorious grounds for such a motion (involuntariness, inadequate colloquy, ineffective assistance). Any grounds not included in the first motion will be deemed waived.

GUILTY PLEA: IMMIGRATION WARNING; WARNING ON PLEA TENDER FORM HELD INSUFFICIENT

The defendant pled guilty to multiple crimes. When the INS moved to deport him, he moved to withdraw his guilty pleas, arguing that he had not been given the immigration warnings required by G.L. c. 278, §29D. The defendant signed three copies of a plea tender form that correctly recited the immigration warning. Further, the judge advised the defendant that a conviction could affect his alien "status" but did not advise the defendant of the possible consequences as required by §29D. *Commonwealth v. Hilaire*, 437 Mass. 809 (2002).

The SJC had previously held in *Commonwealth v. Soto*, 431 Mass. 340 (2000), that the statute requires that the defendant must be advised of three specific (possible) consequences to a plea: (1) deportation, (2) exclusion of admission to the United States, and (3) denial of naturalization. Here, the plea colloquy only advised the defendant that the plea could affect his "status". So, the Commonwealth had to rely on the tender sheets to argue that the defendant had been given the required warnings. The SJC rejected that argument. It held that the statute requires that the "court" provide the warnings. The word "court" means the judge, not the court as an institution, nor other individuals (defense attorney, probation officer, etc.). Therefore, §29D was violated and the defendant was entitled to withdraw his pleas. The SJC noted that the Commonwealth probably could have relied on the tender sheets to reconstruct the record of the plea if the transcript was unavailable. But here the transcript was available and showed that the colloquy was inadequate.

GUILTY PLEA: INEFFECTIVE ASSISTANCE OF COUNSEL; FAILURE TO INFORM DEFENDANT OF IMMIGRATION CONSEQUENCES OF PLEA

The defendant sought by means of a motion for a new trial to withdraw his guilty plea, on grounds that he had been deprived of effective assistance of counsel because his lawyer failed to inform him of the immigration consequences he faced as a result of pleading guilty. In affirming the denial of the motion, the Appeals Court ruled that, because the defendant had been properly advised by the judge pursuant to G.L. c. 278, §29D that his plea could result in immigration consequences, "that the defendant chose to disregard the warnings given by the judge is not the fault of the court or of defense counsel." *Commonwealth v. Fraire*, 55 Mass. App. Ct. 916, 917 (2002). The Court also ruled that counsel was not ineffective because, absent a statutory requirement, "a defendant need not be informed of the collateral consequences of a guilty plea." *Id*. In rejecting to the defendant's assertion that various changes in the immigration laws since

1996 now rendered immigration consequences of a plea so "certain" as to be "direct" rather than "collateral," the Appeals Court relied on rulings of the Supreme Judicial Court handed down since 1996 describing immigration consequences as "collateral in nature." The Court also deemed immigration consequences "collateral" because they are imposed by an agency over which the trial judge has no control. *Id*. at 917-918.

INDICTMENT: AMENDMENT OF DATE WHERE DEFENSE IS ALIBI

In this first degree murder prosecution, after indictment and before trial, the Commonwealth successfully moved to amend the indictment to change the date of the murder from June 21, 1996 to June 19, 1996, after interviewing the co-defendant. This amendment had the effect of undermining the alibi defense based on undisputed evidence that the co-defendants were in Florida on June 21. The SJC concluded that the amendment was one of form, not substance, and was not prejudicial since the defendant had been properly informed of the charge against him and the details of the alibi defense had not been disclosed to the Commonwealth at the time of the amendment. Nor did the amendment materially change the work of the grand jury. *Commonwealth v. Knight*, 437 Mass. 487 (2002).

INEFFECTIVE ASSISTANCE: FAILURE TO OBJECT TO DEFECTIVE STANDARD INSTRUCTION HELD NOT INEFFECTIVE

See *Commonwealth v. Poff,* 56 Mass. App. Ct. 201 (2002), summarized at ***APPELLATE PRACTICE: INEFFECTIVE ASSISTANCE; CLAIRVOYANCE NOT REQUIRED.***

INTERLOCUTORY APPEALS: ATTORNEYS FEES

Mass. R. Crim. Pro. 15(d) allows the defendant to recover "reasonable attorney's fees" if the Commonwealth appeals the allowance of a motion to suppress or a motion to dismiss. In *Commonwealth v. Gonsalves*, 432 Mass. 613 (2000), the Court had upheld the allowance of attorney's fees over a constitutional challenge from the District Attorney's office. The Court remanded the case to the single justice for determination of the proper fees to be awarded in connection with that appeal. The single justice initially awarded fees in the requested amount of approximately $17,000 when the Commonwealth failed to file an opposition. On reconsideration, the award was reduced by $6,000. The defendant appealed, and the full court concluded that the single justice was entitled to reconsider and reduce the amount. *Commonwealth v. Gonsalves*, 437 Mass. 1022 (2002). But the Court remanded again to the single justice for an explanation of the reasons for the reduction of the award. The Court also noted that fees in connection with opposition to the Commonwealth's motion for reconsideration were compensable if they were "reasonable, necessary, and not duplicative" and in connection with the instant appeal "solely to the extent that they directly relate to the issue for which the case is remanded." *Id*. at 1023.

JUROR MISCONDUCT: DENIAL BY JUROR OF BEING A PARTY IN A CRIMINAL PROCEEDING; JUROR IN FACT ON PROBATION FOLLOWING CWOF

The SJC affirmed the denial of a new trial motion where the defendant discovered after trial that a juror, who had denied being a party in a criminal proceeding on the juror questionnaire, had at the time of the trial been on probation following a CWOF. *Commonwealth v. Torres*, 437 Mass. 460 (2002). The trial judge had found that the juror had not lied intentionally and had truthfully testified that, if asked at trial, she would have stated that the matter would not have affected her ability to be fair and impartial. If anything, the trial judge concluded, and the SJC implicitly agreed, the juror's status as a criminal defendant in a drug case would have been of more concern to the Commonwealth than to the defendant. The SJC did not

address the question of whether the defendant should have been entitled to this information in order to use a peremptory challenge to strike a juror whose status as a probationer might have caused her to curry favor with the Commonwealth.

JUROR MISCONDUCT: VIEW OF SCENE

The defendant was convicted of possession of a firearm without a license based in part on testimony from a police officer that, following a high-speed chase, a passenger, identified as the defendant, had bolted from the car, thrown a gun into bushes, and leaped over one fence and climbed another. *Commonwealth v. Philyaw*, 55 Mass. App. Ct. 730 (2002). The defense was misidentification, and the defendant presented evidence that, because of an automobile accident, the defendant would have been unable to climb the fences. Two days after the sentencing, the defendant's mother received a telephone call from a friend who told her that the friend's fellow employee, a juror in the case, had told him that the jurors were unable to decide the case and so had sent one of the jurors to the scene of the crime to determine whether the defendant would have been able to climb the fences. After the prosecutor at a hearing on the defendant's first motion for new trial objected to the mother's affidavit, defense counsel submitted an affidavit from the friend who had spoken with the juror. In that affidavit, the friend stated that the juror had told him that two jurors had been sent to the scene and had reported back that it was possible for the defendant to jump over the fence. Based on this affidavit, the defendant filed an amended new trial motion and sought an evidentiary hearing based on *Commonwealth v. Fidler*, 377 Mass. 192 (1979). The motion was denied without hearing and without explanation. The Appeals Court reversed and remanded for an evidentiary hearing. "The seriousness of the alleged misconduct [of the jurors who viewed the scene] is unquestionable." *Id*. at 737. There is no requirement that there be a direct communication from the jurors before juror questioning is permitted. Here, the affidavit from the juror's friend was adequate to warrant at least questioning him in an evidentiary hearing.

JURORS: EXTRANEOUS INFLUENCE; ADEQUACY OF INQUIRY & REMEDIATION

During jury deliberations on sexual abuse indictments, the deadlocked jurors sent the judge a note saying that one juror watched a television interview with the complainant's mother but that the juror felt it was not swaying him. The judge accepted the note at face value and, without consulting counsel, issued a general instruction to decide the case solely on the evidence. After the verdicts, defense counsel asked that the jurors be polled as to the television interview's influence. Each juror denied being influenced. During the poll, the jurors revealed that several of them discussed what the mother alleged in the interview: that the complainant was never a criminal until he met the defendant. The defendant's motion for a "mistrial" was denied. *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253 (2002). See also ***APPELLATE PRACTICE***: ***POST-VERDICT MOTION FOR MISTRIAL CONSTRUED TO BE RULE 30 OR RULE 25 MOTION***.)

The Appeals Court disapproved almost every aspect of the handling of this issue. First, the court held that the judge was required to consult with counsel before responding to the jury's note. Second, inquiry into the jurors' actual deliberations was erroneous and is forbidden. Third, the judge failed to follow the required procedure for dealing with extraneous influences set out in *Commonwealth v. Jackson*, 376 Mass. 790, 800 (1978), and *Commonwealth v. Fidler*, 377 Mass. 192 (1979). Mid-deliberations the judge should have: (1) determined whether the material went beyond the record, (2) determine how many jurors were exposed to the material, and (3) determine whether the material raised a serious question of possible prejudice by (4) conducting individual voir dire.

As to prejudice, the judge's reliance on the conclusory statements of objectivity in the

juror's note was erroneous. By relying on the note and failing to question the juror, the judge rendered himself unable to exercise informed discretion in determining the question of prejudice. Further, his inaction allowed the jury to deliberate in possession of prejudicial information. Here, the potential for prejudice was substantial because the extraneous information dovetailed with the Commonwealth's theory of the case.

The judge's bland instruction created the possibility that the jury could use the extraneous information to shore up the Commonwealth's shaky case. The instructions given were not curative. They were generic and failed to specifically instruct the jurors about how to deal with the extraneous information. Combined with the prosecutor's improper closing argument, there was a substantial risk of a miscarriage of justice. (The remaining facts are summarized at ***PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FACTS NOT IN EVIDENCE.***)

JURY INSTRUCTIONS: BREAKING AND ENTERING WITH INTENT TO COMMIT A FELONY; STANDARD INSTRUCTION HELD ERRONEOUS

The defendant was convicted of breaking and entering in the nighttime with intent to commit a felony and indecent assault and battery. The defendant and the victim, social acquaintances, drank in a bar together. The defendant testified that the victim left, but suggested that the defendant visit her later in the evening. He did so, knocking on the front door and following a light to the victim's room, where he asked her for marijuana and sat down on her bed. The victim denied inviting him to her house. She testified that she awoke to find him on top of her rubbing her breasts and legs and kissing her neck. She pushed him away and ran for help. Although there was no objection at trial, appellate counsel challenged the judge's instruction on breaking and entering with intent to commit a felony. The judge gave the standard instruction (5.31 of the Model Jury Instructions for Use in the District Court). But that instruction included the following sentence: "If you conclude that the defendant intended to commit [the offense] after entering [the dwelling, etc.], I instruct you as a matter of law that [the offense] would be a felony." That instruction does not clearly require the jury to find that the defendant's intent to commit the felony was present ***at the time of the break***. *Commonwealth v. Poff*, 56 Mass. App. Ct. 201 (2002). Although the beginning of the model instruction correctly states the element of intent, the court held that the later incorrect part of the instruction (quoted above) "could likely have obscured the matter." The court concluded that there was a substantial risk of a miscarriage of justice because the evidence of the defendant's intent was sufficient but not overwhelming.

JURY INSTRUCTIONS: BURDEN OF PROOF; INFERENCES

The trial judge instructed the jury that they may only draw inferences and conclusions from facts proven beyond a reasonable doubt. The Appeals Court rejected the defendant's claim as "strained" that this instruction would require the defendant to prove facts consistent with innocence beyond a reasonable doubt. The instruction, which overstated the Commonwealth's burden (not all subsidiary facts, only the elements of the offense, need be proven beyond a reasonable doubt), had been requested by defense trial counsel and clearly applied only to the Commonwealth's burden of proof, not to inferences favorable to the defendant. *Commonwealth v. Toon*, 55 Mass. App. Ct. 642 (2002).

JURY INSTRUCTIONS: EFFECT OF VOLUNTARY INTOXICATION ON INSANITY DEFENSE

In *Commonwealth v. Herd*, 413 Mass. 834 (1992), the Court held that a defendant might still lack criminal responsibility even if the mental disease or defect was the result of unlawful consumption of drugs. But the Court endorsed a jury instruction that if the Commonwealth

proved "beyond a reasonable doubt that the defendant knew or had reason to know that consumption of drugs would activate a mental disease or defect, then you must find that he was criminally responsible for his actions" and that what the defendant had reason to know was to be determined "in the circumstances known to him." In the recent case of *Commonwealth v. Torres*, 437 Mass. 460 (2002), the judge gave a defense-requested version of the *Herd* instruction but failed to make it clear that what the defendant should have known is a subjective inquiry based on his mental condition. The Court found no substantial likelihood of a miscarriage of justice in light of overwhelming evidence of sanity. The SJC also rejected the claim that there was insufficient evidence that the defendant knew that his consumption of alcohol and drugs "would cause him to lose awareness that his violent and sexual fantasies were only fantasies." *Id.* at 468.

JURY INSTRUCTIONS: EXPERT OPINION EVIDENCE; CLAIM OF BURDEN-SHIFTING LANGUAGE

The judge instructed the jury that expert opinion should be disregarded if the assumptions upon which it is based have not been proven. The defendant claimed that this language was burden-shifting because it would require the defendant to prove the facts underlying his expert's opinion. *Commonwealth v. Rodriguez*, 437 Mass. 554, 561 (2002). The SJC criticized the issue of the word "proven," stating that "use of the word 'true' is better practice because it minimizes any potential confusion with the concept of 'burden of proof.'" But in the context of the charge as a whole, with respect to the issue on which the expert testified (specific intent), the Court rejected the claim that the jury could have been misled.

JURY INSTRUCTIONS: FELONY-MURDER; JOINT VENTURE; KNOWLEDGE THAT JOINT VENTURER IS ARMED

In *Commonwealth v. Jaime J.*, 56 Mass. App. Ct. 268 (2002), the juvenile was found delinquent by reason of first degree murder. The judge instructed the jury that they could find the juvenile delinquent if they found beyond a reasonable doubt that he was armed or was a joint venturer with another who was armed. This instruction was erroneous; the correct instruction with respect to joint venture is that the Commonwealth must prove beyond a reasonable doubt that the defendant knew that the accomplice had a weapon. The error was harmless, however, because the evidence was overwhelming that the defendant was the principal and that he was armed.

JURY INSTRUCTIONS: JOINT VENTURE; KNOWLEDGE

In a murder case, the judge, after a jury request for reinstruction, instructed the jury with respect to the "knowledge" element of joint venture that the Commonwealth must prove beyond a reasonable doubt that there was "a substantial likelihood that the defendant had knowledge that another would commit a crime." *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677 (2002). (The extensive facts are summarized at ***CRIMES: MURDER; JOINT VENTURE; SUFFICIENCY***.) This instruction was incorrect; the correct instruction is that the Commonwealth must prove that the defendant knew that there was a substantial likelihood that his accomplice would commit the crime. But there was no substantial risk of a miscarriage of justice because the original instruction and six other instructions in the supplemental instruction were all correct.

JURY INSTRUCTIONS: MURDER; DELIBERATE PREMEDITATION; JUDGE NOT REQUIRED TO INSTRUCT JURORS THAT CONSCIOUSNESS OF GUILT IS NOT RELEVANT

In *Commonwealth v. Dagenais*, 437 Mass. 832 (2002), the defendant fled after the victim's death. (The extensive facts are summarized at ***EVIDENCE: AUTOPSY PHOTOGRAPHS ADMISSIBLE TO SHOW COMMONWEALTH'S THEORY OF DEATH***.) The judge correctly instructed on deliberate premeditation and on consciousness of guilt. But the defendant requested that the judge instruct the jury that consciousness of guilt could not be used to infer premeditation. The SJC recognized that consciousness of guilt is not normally relevant to deliberate premeditation because it comes after the killing. But the Court upheld the trial judge's refusal to give the instruction because it was unnecessary in light of the other correct instructions. Indeed, they went further and pointed out that consciousness of guilt *can* be considered as evidence of deliberate premeditation in cases where there is evidence of pre-planning for flight, concealment, or destruction of evidence.

JURY INSTRUCTIONS: MURDER; INVOLUNTARY MANSLAUGHTER; DEFENDANT'S ASSERTION OF INACTION DEPRIVES HIM OF RIGHT TO INSTRUCTION

In *Commonwealth v. Dagenais*, 437 Mass. 832 (2002), the murder defendant claimed that he and the victim had stopped on a high bridge over the Merrimack River to discuss her testimony in two upcoming cases and his failure to dispose of the stolen car for her. The victim sat on the ledge of the bridge. When she refused to testify in his favor in the upcoming cases, he approached her but was not close enough to touch her. Hysterical, she backed up, yelled at the defendant to stay away, lost her grip, and fell into the river. (The extensive facts are summarized at ***EVIDENCE: AUTOPSY PHOTOGRAPHS ADMISSIBLE TO SHOW COMMONWEALTH'S THEORY OF DEATH***.)

The defendant argued that the judge's failure to give an involuntary manslaughter instruction created a substantial risk of miscarriage of justice. But the SJC held that the defendant was not entitled to the instruction because his version of events involved no conduct on his part – the victim fell accidentally during a purely verbal argument. Thus there was no conduct that could be characterized as anything less than third prong malice: conduct that in the circumstances known to the defendant, created a plain and strong likelihood of death. This case is closer than the SJC's opinion lets on. Compare this case with *Commonwealth v. Levesque*, 436 Mass. 443 (2002), where it was precisely the defendant's lack of conduct (in failing to report a fire) that constituted sufficient evidence of involuntary manslaughter. There, the SJC held that "[w]here a defendant's failure to exercise reasonable care to prevent the risk he created is reckless and results in death, the defendant can be convicted of involuntary manslaughter." *Levesque*, 436 Mass. at 450. Could not involuntary manslaughter be found here where the defendant claimed that he advanced on his hysterical girlfriend who was sitting on the ledge of a high bridge, backing up and yelling for him to stay away?

JURY INSTRUCTIONS: MURDER; MALICE; UNANIMITY ON THEORY OF MALICE

In a murder prosecution, the trial judge correctly instructed the jury on the three prongs of malice and that they must be unanimous in finding malice. *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677 (2002). (The extensive facts are summarized at ***CRIMES: MURDER; JOINT VENTURE; SUFFICIENCY***.) On appeal, the defendant argued that the rule that the jury must be unanimous on the theory of culpability for murder in the first degree (premeditation, extreme atrocity and cruelty, or felony murder) should be extended so as to require unanimity as to which of the three prongs of malice had been proved. The Appeals Court concluded that the three prongs of malice relate to evidentiary considerations, like the *Cuneen* factors of extreme atrocity and cruelty, as to which the jury need not be unanimous, rather than discrete acts or incidents, such as need be found as to the theories of culpability, with respect to which the jury must be unanimous. There was thus no reason to be concerned that the conviction would result

from different jurors concluding that the defendant committed different acts. Moreover, under the facts of this case, only the first prong of malice, intent to cause death, could have been the basis for the verdict in light of the execution-type murder proved.

JURY INSTRUCTIONS: MURDER; SECOND-DEGREE INSTRUCTION NOT REQUIRED WHERE ONLY THEORY IS FIRST-DEGREE FELONY

For the last eighteen years, the SJC held that G.L. c. 265, §1 requires that the jury be instructed on second-degree murder in every case where first-degree murder is charged. *Commonwealth v. Brown*, 392 Mass. 632, 643-45 (1984). The reason for this was that the statute requires that the degree of murder be found be the jury. But in *Commonwealth v. Paulding*, 438 Mass. 1 (2002), the SJC overruled *Brown* and held that a second degree murder instruction was not required where the only theory presented by the evidence was first-degree felony murder.

The defendant was the accomplice of the shooter. With faces covered, they approached a group of men, the shooter pointed a gun at them and demanded their valuables. The shooter asked the defendant if he should shoot, and then shot the victim.

In instructing the jury, the judge did not define second-degree murder. Rather, she merely instructed the jury that they had the power to return a verdict of second-degree murder. The SJC found no error under *Brown* because the instruction did not preclude the jury from considering second-degree murder. And, under these facts, there was no prejudice because there was no evidence (of malice or of a non-life felony) that could support a second-degree murder verdict.

But the court went much further and overruled the statutory interpretation in *Brown*. The new rule is that a second-degree murder instruction is not required "where the Commonwealth proceeds (and the judge rules that there is evidence) only on the theory of felony-murder in the first degree and there is no evidence of malice that would support a conviction of murder on the theory of deliberately premeditated murder or murder committed with extreme atrocity or cruelty." *Paulding*, 438 Mass. at 10.

PRACTICE TIP: Because the SJC's ruling in this case is a statutory interpretation, it is necessarily retroactive. *Commonwealth v. Ennis*, 398 Mass. 170, 175 (1986). Therefore, defendants previously convicted of second-degree murder on evidence that presented only the theory of first-degree felony murder may be able to benefit from the rule in *Paulding.* They could argue that the jury illegally reached an "unjustified compromise verdict." *Paulding*, 438 Mass. at 10.

JURY INSTRUCTIONS: MURDER; SELF-DEFENSE; EXCESSIVE FORCE

The defendant was convicted of second degree murder and claimed on appeal that the there were errors in the jury instructions on excessive force in self-defense which prevented the jury from returning a verdict of voluntary manslaughter. *Commonwealth v. Toon,* 55 Mass. App. Ct. 642 (2002). The Appeals Court concluded that any error would have been harmless because the defendant was not entitled to a self-defense instruction at all and therefore was not entitled to an instruction on excessive use of force in self-defense. The evidence, which was conflicting and complex, taken in the light most favorable to the defense (which it must be with respect to the issue of whether the defendant is entitled to a self-defense instruction), showed that the defendant stabbed the victim after the victim had pinned him against a van and was choking him. The evidence was insufficient to raise a reasonable doubt as to the defendant's actual belief that he was in imminent danger of death or grievous bodily injury from which he could only save himself by using deadly force and was also insufficient to raise a reasonable doubt as to whether the defendant had availed himself of all proper means to avoid physical combat before resorting to self-defense. The defendant did not testify or introduce any evidence about his actual belief that he was in imminent danger, and there was insufficient circumstantial evidence to establish

such an actual belief. "[A]ll the evidence suggested that the reason for the altercation and ultimately the stabbing was the defendant's intent to defend his manhood against a perceived challenge by a combative and unruly stranger." *Id.*. at 652-53. Nor was there sufficient evidence to raise a reasonable doubt that the defendant had used all means to avoid combat since he could have retreated from the public street. The Court brushed aside the defendant's claim that the evidence was sufficient to raise a reasonable doubt as to his right to use non-deadly force such that the jury should have been instructed to determine whether the use of deadly force was excessive. "Such a position would change the longstanding rule in this Commonwealth that before one is entitled to an instruction on the use of deadly force in self-defense, the evidence must raise a reasonable doubt as to his actual and reasonable belief that he was in imminent danger of death or serious bodily harm, not as to a mere concern for personal safety." *Id*. at 654.

PRACTICE TIP: It would seem on these facts, where the defendant was being choked and was pinned against a van, that the evidence was sufficient to raise a reasonable doubt that the defendant had the right to use at least *non-deadly* force. There would also seem to be at least a reasonable doubt that the defendant did not have the ability to retreat at that moment (as opposed to an earlier stage of the verbal confrontation). Shouldn't the jury have had the opportunity to decide whether the stabbing constituted excessive force in self-defense (*i.e.*, voluntary manslaughter)? There does not appear to be any SJC decision which squarely supports the Appeals Court's conclusion that the evidence must create a reasonable doubt only as to the right to use *deadly* force in self-defense in order to warrant an excessive force instruction. There are also no SJC decisions which squarely support the defendant's position that he was entitled to the instruction.

JURY INSTRUCTIONS: MURDER; THIRD PRONG OF MALICE

After having gotten into a minor altercation with the victim, the defendant struck and killed the victim while driving his car. But the evidence, including the manner in which the victim was struck, was sharply conflicting on the key issue of whether the defendant had struck the victim intentionally or unwittingly while attempting to flee from the victim and her friends, who had returned with her to seek retribution from the defendant from the altercation. *Commonwealth v. Cherubin*, 55 Mass. App. Ct. 843, 836-838 (2002). After his conviction for second-degree murder was affirmed on direct appeal, the defendant filed a motion for a new trial, claiming for the first time that the trial judge's instructions on the third prong of malice, to which his trial attorney had not objected, was erroneous for stating that malice includes intending to do an act that creates "a plain and strong likelihood that death *or grievous bodily injury or harm* will follow." The trial judge denied the motion. Finding that the defendant had waived the claim for failing to raise it earlier, the trial judge concluded that "the evidence … compelled a finding that the defendant's attack was inherently deadly, [so that] the erroneous jury instruction did not create a substantial risk of a miscarriage of justice." *Id.* at 838-839.

But the Appeals Court disagreed, reversed the defendant's conviction, and granted a new trial. The Court found that "the jury could have reasonably inferred, if properly instructed, that the defendant did not intentionally hit the victim. The jury could also have concluded that the defendant drove the car in a manner that, in the circumstances known to the defendant, created a plain and strong likelihood of grievous bodily injury, but not death, despite that fact that death resulted." *Id.* at 842. The Appeals Court distinguished cases in which errors in third-prong malice instructions were ruled harmless on grounds that malice could be "ineluctably inferred" from the defendant's use of an inherently dangerous weapon. The Appeals Court relied on a line of cases holding that "although an automobile may be used as a dangerous weapon, it is not an inherently dangerous weapon." *Id.* at 842-843.

JURY INSTRUCTIONS: MURDER; THIRD PRONG OF MALICE; DEADLY FORCE IN SELF DEFENSE; JOINT VENTURE

Two weeks after the defendant and his brother had an altercation with the victim, the three of them attended a party. *Commonwealth v. Young,* 56 Mass. App. Ct. 60 (2002). Knowing that the victim was going to be at the party, the defendant and his brother each brought a gun, and each knew the other had one. When the victim taunted and swung a mop handle at the defendant, the defendant's brother stepped in front of the defendant and shot the victim. Convicted of second-degree murder, and appealing the denial of his motion for a new trial filed after direct appeal, the defendant claimed three errors in jury instructions, which the Appeals Court reviewed under the substantial-risk-of-a-miscarriage-of-justice standard. The Appeals Court ruled that trial judge's erroneous inclusion of "grievous bodily harm" language in the jury instruction on third-prong malice was harmless, because the jury could not but find that a plain and strong likelihood of death would follow the two brothers', "carefully laid plans" to bring guns to their encounter with the victim as well as the shooting of the victim at point blank range. *Id.* at 66. The Appeals Court also ruled that there was no error giving an instruction on the use of deadly force in self-defense while omitting any reference to the use of nondeadly force "given that the defendant (and his brother) responded to perceived threats from the victim … with nothing less than deadly force…" *Id.* at 66. Finally, the Appeals Court ruled that the joint venture instructions did not compel the defendant's conviction for the same offense as his brother while depriving him of the prospect of a lesser conviction for manslaughter, because, although the joint venture instructions required conviction for the same crime, "[t]he judge clearly articulated that differing verdicts could be returned against [the defendant and his brother], depending on whether the jury found there was a joint venture." *Id.* at 68.

JURY INSTRUCTIONS: MURDER; THIRD PRONG OF MALICE; MENTAL IMPAIRMENT AND INTOXICATION

Convicted of second-degree murder, the defendant appealed the denial of his second motion for a new trial on grounds that the Judge had erred by including the phrase "grievous bodily harm" in his instruction on third-prong malice. The evidence showed that, after being injured by two brothers during a bar fight and then ejected, the defendant said to a friend that "they were not going to get away with it," returned, and stabbed one of his antagonists once in the chest with a knife. There was evidence that the defendant was intoxicated at the time. Afterwards, the defendant went to a hospital where he said that he had fought with three men, "decked" one, thrown another against a wall, and that the third had taken his knife from him. He said that could not remember anything else. Expert testimony was introduced that the defendant was of borderline intelligence, had suffered alcohol-induced hallucinations during the incident, and that he suffered from "organic brain syndrome." *Commonwealth v. LaPointe*, 55 Mass. App. Ct. 799, 801 (2002).

The Appeals Court held that the defendant had waived the claim for failure to raise it on direct appeal or in a first motion for new trial and also ruled that, in any event, the error did not create a substantial risk of a miscarriage of justice. As grounds, the Court reasoned that the "stabbing would not have warranted the jury finding an objective risk of harm less than a strong likelihood of death." The defendant argued that that conclusion was "not mandated" in light of the evidence of his mental impairment, his intoxication, and his remarks at the hospital which indicated he had no subjective knowledge of having stabbed someone, so that the jury could have erroneously found third-prong malice based on conduct that, *in the circumstances known to the defendant,* did not pose an objective risk of death – i.e. "decking" and throwing someone against

a wall. But the Appeals Court ruled that there was no substantial risk of a miscarriage of justice in light of the "overwhelming evidence of rationality, planning and composure", including the defendant's making an avenging remark, driving back to the bar, arming himself, locating a specific victim, striking "a single fatal blow with apparent dexterity," and then immediately retreating and seeking medical attention for his own injuries.

In an unusual dissent by two judges in a five-member-panel decision, Justice Duffly, with whom Justice Gillerman joined, criticized the majority for failing to properly consider the evidence of the defendant's mental impairment. *Id.* at 807. According to the dissent, the evidence viewed "as a whole" as required under the substantial-risk standard, including the evidence of "substantial impairment, that is to say, his subjective understanding of what he was doing at the time did not require the jurors to find that the defendant knew he had a knife and knew that he had stabbed the victim." *Id.* at 807. As a result, "by instructing the jury [eight times!] that they could return a verdict of second degree murder merely upon proof that [in the circumstances known to the defendant] the defendant's conduct was likely to cause grievous bodily injury, the live issue at trial was effectively eliminated from the jury's consideration." *Id*. at 810.

The dissent also considered that the error could have been compounded by the trial judge's twice instructing the jury that they were "permitted to infer malice from the intentional use of a dangerous weapon" because that instruction, in addition to other flaws (such as not including the caveat that malice "does not have to be" so inferred) "permitted the jury to infer malice without considering whether the defendant's impairment precluded his forming the requisite intent to use such a weapon." *Id*. at 811

JURY INSTRUCTIONS: MURDER; VOLUNTARY MANSLAUGHTER; PROVOCATION; LACK OF MEMORY DEPRIVES DEFENDANT OF RIGHT TO INSTRUCTION

The defendant was arrested for murdering his wife, shooting her three times. *Commonwealth v. Sirois*, 437 Mass. 845 (2002). The defendant gave a statement to the police claiming that, as he was leaving the house, his wife called to him. Then she advanced toward him with a pistol in her hand, pointing downward. She brought the pistol up, but he grabbed at her hand and twisted. Then there were three bangs. The defendant professed complete ignorance of what happened. Indeed, the trial theory was that the defendant had no intent whatsoever, much less deliberate premeditation. (The remaining facts are summarized at ***ADMISSIONS AND CONFESSIONS: MIRANDA; THREE-HOUR LAPSE BETWEEN WARNINGS AND QUESTIONING HELD PERMISSIBLE***.)

The instructions on provocation misplaced the burden of proof, requiring the Commonwealth to *prove* rather than disprove provocation. *Commonwealth v. Acevedo*, 427 Mass. 714, 716 (1998). But the Court held that there was no prejudice because the defendant was not entitled to a provocation instruction in the first place. The evidence in the light most favorable to the defendant was only that he had no knowledge and no emotional reaction to his wife's armed advance upon him. Therefore, there was no evidence of provocation, *i.e.*, such a state of passion, anger, fear, fright, or nervous excitement as would eclipse the capacity for reflection or restraint. (Query: could not a reasonable juror infer that, regardless of the defendant's lack of memory of the incident, the victim's advance with a gun provoked in the defendant, at the time of the incident, the emotional reaction necessary to entitle him to the instruction?) On the other hand, the SJC noted that the evidence *did* entitle the defendant to instructions on self-defense and excessive force in self-defense. But the instructions on those concepts were correct and not challenged on appeal.

JURY INSTRUCTIONS: PRESUMPTION OF INNOCENCE; CLAIM OF BURDEN-

SHIFTING LANGUAGE

In an otherwise unremarkable instruction on the presumption of innocence, the trial judge stated: "It is only when the Commonwealth begins to introduce its evidence that this presumption in favor of innocence may begin to disappear. If the evidence against him goes in, the presumption may grow less and less strong…" *Commonwealth v. Rodriguez*, 437 Mass. 554 (2002). The SJC found this language, "while not preferred," is an acceptable "way of conveying to the jury that it takes evidence to overcome the presumption of innocence" and satisfactory in light of the instructions as a whole, which adequately informed the jury that the presumption of innocence remained throughout the entirety of the case." *Id.* at 560.

JURY INSTRUCTIONS: PRESUMPTION OF INNOCENCE; "DISAPPEARING" PRESUMPTION LANGUAGE DISAPPROVED

See *Commonwealth v. O'Brien*, 56 Mass. App. Ct. 170 (2002), summarized at ***PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FAILURE TO PRODUCE WITNESS; ARGUMENT OF EXCLUDED EVIDENCE.***

JURY INSTRUCTIONS: SIMPLE JOINT POSSESSION OF NARCOTICS

The defendant was convicted of trafficking in 14-28 grams of cocaine. He appealed, arguing that the judge failed to give a requested instruction on simple joint possession. Taken in the light most favorable to the defendant, the evidence was that, at the defendant's suggestion, he and two friends decided to pool their money to buy cocaine. They took the money to a drug dealer's house, where all three participated in the negotiation, and were present during the exchange. After an altercation with a fellow customer outside, the defendant was arrested. A charge on the lesser offense of simple joint possession is required where the evidence permits a finding that "two or more persons simultaneously and jointly acquire possession of a drug for their own use intending only to share it together." On these facts, the Appeals Court agreed that an instruction on simple joint possession was required. *Commonwealth v. Blevins*, 56 Mass. App. Ct. 206 (2002). No such instruction was given, so the conviction was reversed.

JURY SELECTION: CHALLENGES FOR CAUSE; DEFERENCE TO TRIAL JUDGE'S DISCRETION

The Appeals Court upheld a juvenile's delinquency finding by reason of first-degree murder and armed robbery despite the claim on appeal that the trial judge erred in refusing to remove several jurors for cause. *Commonwealth v. Jaime J.*, 56 Mass. App. Ct. 268 (2002). The judge has broad discretion in determining whether the juror is impartial. Here, the Appeals Court rejected the claims of abuse of discretion in refusing to strike for cause the following jurors: (1) a juror who had been robbed at gun point but, inferably (the tape was inaudible), stated that he could be impartial; (2) a parent of two college students (the victim here was a college student) who had heard of the incident in the news and had told his wife that he would not want to receive a call that his child had been killed but who stated he could be impartial; (3) a juror who was concerned that he would lose his job due to jury service but was assured by the judge that he could not be fired for that reason; (4) a juror whose girlfriend had been raped and who stated that "it might be difficult" for him to be impartial but who said he "probably" could render a fair and just verdict; (5) two jurors who had friends and family in law enforcement, one of whom said he thought he could remain impartial and the other of whom "imagined[d]" he could remain impartial; and (6) a juror who had previously served on an "assault to murder" case who initially said it would be difficult to remain impartial but who, under questioning from the judge, said he could base the decision on the evidence and who also inferably said that his past experience would not affect his ability to be impartial.

JUVENILES: EXPUNGEMENT AND SEALING OF JUVENILE RECORDS; POWER OF JUVENILE COURT JUDGE TO ORDER EXPUNGEMENT

The juvenile defendant had been arraigned on charges of being a disorderly person and participating in an affray stemming from a fight. The juvenile, an honors student with no prior record, contended that his arrest was a mistake and that, in fact, he was a victim of the fight which had resulted in his arrest. He produced witnesses to corroborate his version of events. The Commonwealth's witnesses failed to appear for trial. The juvenile court dismissed the charges, over the juvenile's objection (the Commonwealth did not object). On the juvenile's later motion, the motion judge ordered expungement of the police and probation records of the case and arrest.

The commissioner of probation appealed, and the SJC, on direct appellate review, reversed the expungement order. *Commonwealth v. Gavin G.*, 437 Mass. 470 (2002). The Court distinguished "the seminal case" of *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640 (1978), in which expungement of police records of a juvenile's arrest was upheld. The Court found that the important factor in its earlier decision, *i.e.*, the complete absence of any legislative scheme concerning the release of the police records, was inapplicable here because "a detailed statutory scheme protects the confidentiality of Juvenile Court proceedings." *Id*. at 473. Specifically, the juvenile has available remedies for the sealing of records under G.L. c. 276, § 100A and § 100B. Consequently, the Court concluded, the legislature had determined that expungement of the court records is not to be an available remedy. Justice Ireland dissented, concluding that the statute, as well as the mandate of the Juvenile Court judges "to treat those appearing before them not as criminals but as children in need of aid, encouragement, and guidance," gives judges the inherent authority to order expungement.
Id. at 484.

PRACTICE TIP: The opinion contains a very extensive analysis of the interplay of the various sections of the sealing statute both for juveniles and adults.

PLEA: ALFORD PLEA, JUDGE'S REFUSAL TO ACCEPT

The defendant, who was charged with first-degree murder, attempted to offer an Alford plea to manslaughter, with a joint sentencing recommendation. *Commonwealth v. Gendraw*, 55 Mass. App. Ct. 677 (2002). (The extensive facts are summarized at ***CRIMES: MURDER; JOINT VENTURE; SUFFICIENCY***.) First one judge refused to accept the Alford plea because she had a policy of accepting such pleas only where the defendant claims lack of memory. Then the trial judge refused to accept the Alford plea because she would only accept traditional guilty pleas from defendants. The Appeals Court found no abuse of discretion in such blanket policies.

PROBABLE CAUSE HEARING: TIMELINESS

See *Commonwealth v. Arias*, 55 Mass. App. Ct. 782, 783-784 (2002) summarized at ***COMPLAINTS; FAILURE TO FILE APPLICATION FOR COMPLAINT; DISMISSAL***

PROBATION: REVOCATION; ORDER FOR RANDOM URINE SCREEN IMPOSED BY PROBATION OFFICER

After the defendant pleaded guilty to assault and battery by means of a dangerous weapon and possession of a class D substance, he was placed on probation. The judge imposed several conditions, including that the defendant submit to "treatment as deemed necessary." After a psychologist conducted an evaluation, as ordered by the judge, the probation officer adopted the

psychologist's recommendation that random urine testing be made part of the defendant's probation. The defendant refused to sign this new condition of probation, and the trial judge then revoked probation. *Commonwealth v. Lally*, 55 Mass. App. Ct. 601 (2002). The revocation was improper because the probation officer had no authority to impose a condition of probation. The random urine testing did not fall within the judge's original condition of "treatment as deemed necessary." The judge could have modified the conditions in order to order the testing, but revocation could not be based on the defendant's refusal to submit to the probation officer's new condition.

PRACTICE TIP: The importance of this case clearly extends beyond the narrow issue of urine tests. Any time a probation officer's requirements expand the original conditions of probation, as ordered by the judge, a probationer should not be required to follow the new condition. But, as a practical matter, it is often difficult to achieve meaningful success on appeal due to the long appellate process. In *Lally*, by the time the Appeals Court reversed the revocation, the defendant had already completed the sentence.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; APPEAL TO EMOTION; IRRELEVANCIES; DENIGRATION OF DEFENSE

In a first-degree murder appeal, the SJC criticized three statements made by the prosecutor in closing argument: (1) that the victim "didn't deserve to die this way; (2) that the burden of proof is "the price we pay for living in a free, democratic society; and (3) that the defense strategy of accusing three other people of the crime was "despicable." The first statement was an improper appeal to the jury to convict the defendant because of the atrocious nature of the killing. The second statement was a "purposeless rhetorical flourish with the danger of all such irrelevancies." The third statement was an improper denigration of the defense which "smacks more of an ad hominem attack. None of the remarks were objected to, but there was no substantial risk of a miscarriage of justice in light of the overwhelming evidence of guilt. *Commonwealth v. Gentile*, 437 Mass. 569, 580-81 (2002).

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FACTS NOT IN EVIDENCE

The defendant was charged with sexually abusing a troubled teen in the 1970's. The teen denied any abuse at the time. But in the 1990's, the complainant faced serious criminal charges of his own and accused the defendant of abuse. The defense responded that the complainant's allegations were due to his own criminal charges as well as an interest in suing the defendant for damages. The defense pointed out that the complainant continued friendly correspondence with the defendant into the 1980's. The prosecutor asserted in closing that victims of abuse commonly delay disclosure and maintain relationships with the abuser. *Commonwealth v. Fredette*, 56 Mass. App. Ct. 253 (2002).

The prosecutor's argument was improper. Only expert testimony could have provided a basis for this argument, and there was no such testimony. Therefore, the prosecutor improperly argued facts not in evidence. There was no objection and the judge's instructions were standard, not curative. Because the case depended almost entirely on the complainant's credibility, the argument created a substantial risk of a miscarriage of justice. See also ***JURORS: EXTRANEOUS INFLUENCE; ADEQUACY OF INQUIRY & REMEDIATION.***

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; COMMENT ON FAILURE TO PRODUCE WITNESS; ARGUMENT OF EXCLUDED EVIDENCE

The defendant was charged with stealing a plow truck. The truck was parked in a Boston hospital parking lot with the keys in it. The defendant told an employee who saw him leaving

that he was taking the vehicle to City Side garage for maintenance. He then drove the vehicle to Brockton where he got into an accident. This was how the hospital, the owner of the vehicle, learned of its whereabouts. The defendant was arrested later, driving a different vehicle that was not his. He made Mirandized inculpatory statements to the police, but they were excluded because they were not timely disclosed. The Brockton incident was also excluded as hearsay because the Commonwealth did not produce the Brockton police or others at the accident. In closing, the prosecutor explicitly told the jury that the investigation was precipitated by "a call from the Brockton police department" that "had possibly reported the defendant as having stolen the truck and as having been caught with the truck." The prosecutor then argued that, if the defendant was an employee of City Side, "perhaps there would have been an employee of City Side here to testify on his behalf" or "he wouldn't have been charged with this crime." *Commonwealth v. O'Brien*, 56 Mass. App. Ct. 170, 172-73 (2002). Defense counsel objected to both remarks.

The Appeals Court ruled that the reference to the excluded Brockton incident was "particularly inexcusable" because the judge had repeatedly ruled that it was inadmissible. The "missing witness" comment was also improper. The prosecutor did not ask, as she was required to do, for the judge to determine whether there was sufficient foundation for the adverse inference. In this case, the comment would have been permissible after advance approval "only if 'the evidence against [the defendant] is so strong that, if innocent, he would be expected to call them.'" *O'Brien*, 56 Mass. App. Ct. at 173 n.4. Although the judge had agreed to address these improprieties, the Appeals Court held that the instructions were only standard and did not cure the errors. The judge's charge did not provide a "focused and specific response" to the prosecutor's improprieties. Thus, the instructions could not be considered curative.

Further, the judge "muddied the waters by going on to employ the conceit of the disappearing presumption of innocence." The jury were told that as the evidence accumulates against the defendant, the presumption grows less strong and eventually disappears entirely. The instruction is technically correct. But where the prosecutor had just faulted the defendant for failing to rebut the Commonwealth's evidence, the instruction could have led the jury to believe that the defendant had a duty to produce witnesses or evidence. The court noted that the charge is not preferred and should be avoided. Reviewing the case under the "prejudicial error" standard, the case was reversed because the comments went to the burden of proof and the admitted evidence was very weak.

PRACTICE TIP: The Appeals Court reviewed this case under the "prejudicial error" standard of review set out in *Commonwealth v. Kozec*, 399 Mass. 514, 518 (1987). However, there is a strong argument to be made that the prosecutor's arguments were not general misconduct but instead infringed upon two specific constitutional rights: the right to be presumed innocent and the right to proof beyond a reasonable doubt. Argue that you are entitled to the "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18 (1967).

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; IMPROPER APPEALS TO SYMPATHY; STATEMENT OF PERSONAL BELIEF

In a prosecution for first-degree murder and other charges, the prosecutor in closing argument stated: "They [the victims] had a right to sleep in their bed without this man coming in there. … You have the conscience of the community. She had rights, she had the right to go to bed at night. She had the right to live. He took those rights. She called out, 'Daddy help me.' But her father was dead. You could answer the call for justice and hold [the defendant] accountable for what he did. He's guilty as charged." *Commonwealth v. Torres*, 437 Mass. 460 (2002). The SJC found the reference to the "conscience of the community" to be proper because in a first-degree murder prosecution based on extreme atrocity and cruelty, "the jurors serve as

the conscience of the community in determining whether the killing merits that description." *Id.* at 465. But the remarks concerning victims' rights were improper appeals to sympathy, as were the reference to the dead father. The statement that the defendant was guilty was an improper statement of personal belief. The conviction was affirmed, however, because the Court found that the errors were not prejudicial in light of the overwhelming evidence of guilt.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT; MISCHARACTERIZATION OF THE EVIDENCE

From the government's evidence the jury could have concluded that the defendant, a drug-dealer, bickered with his friend the victim over missing drugs, pointed his gun at the victim's stomach while the victim held the barrel and said "Give it to me," that a shot was heard, and that the victim died of a single gunshot wound to the abdomen fired at close range. Though there were no eyewitnesses to the shooting, the Court held that these facts were nevertheless sufficient to support a finding that the defendant had murdered the victim with deliberate premeditation. *Commonwealth v. Coren*, 437 Mass. 723 (2002). The defense theory, however, which was also supported by the evidence, was that the defendant and victim had merely bickered over whether the victim could borrow the defendant's gun in order to collect a debt, that the shot heard was a 'test shot', that the victim had been alive and uninjured after this shot was fired, and that the victim had been shot elsewhere by others while attempting to collect the debt, and had made it back to the defendant's house after being shot, whereupon he collapsed. The defense also presented an alternate theory that the defendant had shot the victim by accident.

The Supreme Judicial Court reversed the defendant's conviction on grounds that the prosecutor's several mischaracterizations of the evidence in closing argument, to which defense counsel made timely objection, constituted prejudicial error. The Court ruled that the prosecutor had improperly characterized the exchange between the defendant and victim, by stating that the victim had said "Don't shoot ", that the defendant had been "yelling", and that the defendant had been pushing the gun into the victim's stomach while the victim was pushing it away, none of which was supported by the evidence. *Id*. at 730-734. The Court also relied on the fact that the Judge had declined to give "particularized instructions to neutralize the errors in the prosecutor's argument," but had relied only on the standard instructions that closing remarks of counsel were not evidence. *Id*. at 733.

SEARCH AND SEIZURE: ABANDONED PROPERTY; NO REASONABLE EXPECTATION OF PRIVACY IN GUEST ROOM

In *Commonwealth v. Mallory*, 56 Mass. App. Ct. 153 (2002), the defendant lived as a friend of the family in a four-bedroom, single-family house. He had a single bedroom in the house where he kept his clothes and belongings. He did not pay rent, but he shared the food expenses. His room was not kept locked, although the family would knock before entering out of "courtesy." One day, the defendant plied the teenage daughter of the family with drugs and alcohol, beat her, and raped her. The father returned from work and the daughter emerged naked, beaten, and crying. The father went to retrieve a club, but the defendant fled out a window and never returned. The father saw alcohol, drugs and his daughter's clothing in plain view. When the police responded, they searched the defendant's room with the father's consent but without a warrant. They retrieved evidenced of the assault.

The motion judge allowed the defendant's motion to suppress, finding that the defendant had a reasonable expectation of privacy in the room and that he had not abandoned the property. But the Appeals Court reversed. The court looked to several factors to determine whether the defendant had a reasonable expectation of privacy in the room: the character of the location, whether the defendant owned it, and whether others had free access. Here, the father routinely

entered the room, even though he knocked out of courtesy. Thus, the defendant's very limited expectation of privacy depended on the defendant and the host family. When the daughter appeared and told the father what happened, the relationship no longer entailed a reasonable expectation of privacy. The defendant's flight showed that he himself recognized his unwelcome status. At that point, he was no longer an occupant. Therefore, he had no reasonable expectation of privacy.

This case does *not* mean that guests have no expectation of privacy in their rooms. The ruling here is very fact-specific: the defendant's limited expectation of privacy was destroyed because he was aware that his host no longer considered him a guest.

The Appeals Court went on to rule that the defendant had no reasonable expectation of privacy because he abandoned the property. His actions in fleeing the father clearly demonstrated his intention not to return. The fact that the police did not *know* he had abandoned the property at the time of the search did not affect the analysis. Because he abandoned the property before the search, he had no rights left that he could assert against the police action.

SEARCH AND SEIZURE: REASONABLE EXPECTATION OF PRIVACY; LICENSE PLATE NUMBER

A police officer, following the car driven by the defendant and observing nothing suspicious or unlawful, ran the license plate number through the state computer system and learned that the license number did not match the car. He stopped the defendant, questioned him, and eventually arrested him for driving after revocation of his driver's license. *Commonwealth v. Starr*, 55 Mass. App. Ct. 590 (2002). The Appeals Court upheld the denial of the motion to suppress. There was no reasonable expectation of privacy in the display of the license nor in the Registry's computer records. Merely following and observing the vehicle did not constitute pursuit. There was, therefore, no Fourth Amendment violation. Although the defendant on appeal did not adequately raise a claim under Article 14 of the Massachusetts Declaration of Rights, the Court found no basis for concluding that there would be any state constitutional claim either.

PRACTICE TIP: The Appeals Court suggested that there would be, "at the very least, 'a real cause for concern'" if there had been any evidence of racial or ethnic profiling. *Id*. at 985 n.8.

SEARCH AND SEIZURE: REASONABLE SUSPICION; ANONYMOUS TIP; RELIABILITY

A tipster presented himself at the State Police barracks and reported that he had just observed a maroon Grand Prix driving erratically and chasing an Aladco truck at eighty miles per hour on a single-lane road during rush hour. The desk officer never asked the tipster for his identity but wrote down the license plate number of the car that the tipster left in. The defendant was observed in a maroon Grand Prix stopped at a traffic light behind an Aladco truck. The police pulled both vehicles over. As a result, the defendant was arrested and charged with OUI. *Commonwealth v. Love*, 56 Mass. App. Ct. 229 (2002). The defendant moved to suppress, arguing that the tip was not sufficiently reliable. Tips from anonymous persons are subjected to greater scrutiny, *Commonwealth v. Barros*, 431 Mass. 171, 177 (2001), so the defendant argued that the tip was anonymous. The Appeals Court held that the tip was not subject to the greater scrutiny for anonymous tips because: (1) the tipster did not decline to be identified, (2) he presented himself in person to the police, and (3) the tipster was identifiable through the license plate number. The court noted that if the tipster either refused to identify himself or did not present himself in person, the tip would have been treated as anonymous. But, because he did those things, the tipster was not protected from the consequences of prevarication, exposing

himself to charges of filing false reports and risking reprisal from those he accuse. The tip was reliable, and the motion to suppress should have been denied.

SEARCH AND SEIZURE: REASONABLE SUSPICION; EMERGENCY EXCEPTION

A district court judge allowed the defendant's motion to suppress, but the Appeals Court reversed. *Commonwealth v. Love*, 56 Mass. App. Ct. 229 (2002). (The facts are summarized at ***SEARCH AND SEIZURE: REASONABLE SUSPICION; ANONYMOUS TIP; RELIABILITY***). The court found justified the search on other grounds, but rejected the Commonwealth's reliance on the emergency exception. A tipster had reported a car chasing a truck at eighty miles an hour on a one-lane road during rush hour. The police later observed a car behind a truck, each matching the description given, stopped at a traffic light. The court opined, but did not hold, that the emergency exception did not apply "[b]ecause there was no immediate, ongoing emergency at the time."

SEARCH AND SEIZURE: REASONABLE SUSPICION FOR THRESHOLD INQUIRY; PROBABLE CAUSE FOR SEARCH OF PERSON

The police received a tip from a confidential informant, who had provided information in the past that had led to at least one arrest and prosecution, that a Hispanic man, over six feet tall and heavy set, would be arriving at a liquor store lot in a blue mid-80s Buick sedan with a license plate number 689OCL for the purpose of selling cocaine. The police set up surveillance of the parking lot and later observed a car matching the description, driven by a man who also matched the description given by the informant. The driver scanned the area, left the lot, came back, scanned the area again, backed the car against a fence, and continually checked the rear view mirror. The police decided to make a threshold inquiry and ordered the driver (the defendant) to put his hands on the steering wheel. The defendant placed one hand on the wheel but kept the other hand down, with a clenched fist. One of the officers thought that there might be a weapon in the fist; he grabbed the fist, pried it open, and six packages of cocaine fell out. *Commonwealth v. Lopez*, 55 Mass. App.. Ct. 741 (2002).

The Appeals Court concluded that the motion to suppress was properly denied. The threshold inquiry was warranted because the police had reasonable suspicion to make a Terry-type stop. The confidential informant was reliable and had some basis of knowledge, as evidenced by his prediction about the time the defendant would show up and his description of the car and license plate number. Any weakness in the basis of knowledge was made up for by the police's observations of the defendant's behavior.

The eventual search was justified by probable cause. The police were justified in swarming around the defendant and ordering him to put his hands on the wheel since they had a reasonable suspicion that a drug transaction was about to occur. When the defendant failed to put his hand on the wheel, the police officer reasonably concluded that he has concealing something and was reasonably concerned for his safety. Aside from apprehension of danger, there was probable cause to open the fist because the defendant's actions were "highly suggestive, at least that he was concealing something unlawful." *Id*. at 745.

SEARCH AND SEIZURE: REASONABLE SUSPICION; GANG ACTIVITY UNCONNECTED TO DEFENDANT HELD INSUFFICIENT

The defendant was stabbed but refused to cooperate with the police. The police suspected that the stabbing related to a Cape Verdean gang feud in the Homes Avenue area. One officer testified to a high rate of violence in the Cape Verdean community. Two days later, the police noticed the defendant riding a bicycle away from the Homes Avenue area, keeping his hand inside his pants. They pulled abreast of the defendant and ordered him to stop three separate

times. After an officer exited his vehicle to confront him, the defendant feigned a stop and then sped away. At that point, the police suspected that the defendant had a gun. They pursued him and eventually retrieved a gun. After Miranda warnings, the defendant made inculpatory statements. *Commonwealth v. DaSilva*, 56 Mass. App. Ct. 220 (2002).

The Appeals Court held that both the gun and the statements should have been suppressed. Although the motion judge ruled that the defendant was not seized until he sped off and the police pursued him, this contradicted the only testimony given (from the arresting officer). The officer testified that he ordered the defendant to stop three separate times before the defendant fled. The motion judge explicitly adopted the officer's testimony but then disregarded this portion. The Appeals Court held that this was clear error.

On the officer's testimony, the defendant was seized at least at the time of the second order to stop. But there was no reasonable suspicion at that time. The police had no specific and articulable facts that the defendant had committed or was about to commit a crime. There was no evidence that the defendant previously behaved violently or possessed weapons. The police did not view the defendant's hand in his pants as threatening. The high crime rate and gang violence in the Homes Avenue area had no connection in the evidence to the defendant. Indeed, the defendant was riding *away* from Homes Avenue. The police suspicion that the defendant (who appeared to be an adult) was carrying a concealed firearm cannot form the basis for reasonable suspicion because such possession can be legal for adults. Finally, the defendant's flight "cannot be used to supply the requisite reasonable suspicion to justify the prior police action." *Id.* at 225 n.5 (citing *Commonwealth v. Thibeau*, 384 Mass. 762, 763-64 (1981)). Therefore, the gun should have been suppressed. Because there was a direct causal link between the illegal stop of the defendant and his inculpatory statements, they should have been suppressed as fruit of the poisonous tree. *DaSilva*, 56 Mass. App. Ct. at 228 n.9.

SEARCH AND SEIZURE: REASONABLE SUSPICION; ILLEGAL STOP

In *Commonwealth v. Smith*, 55 Mass. App. Ct. 569 (2002), a police officer observed the defendant talking to a male and a female in the afternoon in downtown Brockton. The defendant gestured to an auto repair shop, which was open, and all three proceeded to an alleyway next to the garage. The officer saw the other male reach into his pocket. The officer believed that a drug transaction was about to occur, identified himself as a police officer, and asked the three what they were doing there. When none responded, he ordered them to stop. The other two people did stop, but the defendant rode his bicycle toward the officer, who told the defendant three times to stop, and, when the defendant failed to stop, the officer blocked the defendant's path with his arm, causing him to fall. The defendant began spitting up a white substance later identified as cocaine. The Appeals Court held that the motion judge should have allowed the motion to suppress since there was no reasonable suspicion at the time the defendant was initially ordered to stop. The Court rejected the judge's reliance on the nature of the area as a high crime area, the defendant's action of directing the other two people to the alleyway, and the other male's action of placing his hand in his pocket. The initial order to stop was a seizure for constitutional purposes. The defendant was not a known drug dealer, and no actual transaction or furtive activity was observed. Reasonable suspicion "cannot be based on a hunch or on good faith."

The Court declined to reach the issue, not argued by the Commonwealth and not developed in the factual record below, as to whether there were "any intervening actions by the defendant sufficient to break the 'causal chain' between the initial unlawful stop and the subsequent discovery of the cocaine for purposes of the fruit of the poisonous tree doctrine." *Id*. at 574.

SEARCH AND SEIZURE: STRIP SEARCH; PROBABLE CAUSE

The police saw the defendant on the street with an open beer bottle and arrested him for being a minor in possession of alcohol. A post-arrest pat-frisk at the scene revealed that the defendant was wearing shorts under his baggy pants and resulted in the seizure of a bottle of cognac and a knife. A second "thorough" search at the squad car uncovered nothing additional. *Commonwealth v. Ramirez,* 56 Mass. App. Ct. 317, 318 (2002). At the police station, the officers subjected the defendant to a strip search, which resulted in the seizure of a small container of cocaine, which eventually led to trafficking and school zone convictions.

The Appeals Court ruled that the trial court erred in denying the defendant's motion to suppress the cocaine, finding that the strip search was illegal. Applying the standard first enunciated in *Commonwealth v. Thomas,* 429 Mass. 403 (1999), the Appeals Court ruled that the police did not have probable cause to believe that a strip search would reveal a weapon, contraband, or the fruits or instrumentalities of criminal activity. The Appeals Court reasoned that charges for which the defendant was arrested did not "involve[] small or easily concealed contraband;" and the defendant had already been subject to two searches, the first of which uncovered a knife that was "not small and easily concealed," and the second of which was "thorough" and uncovered nothing. The defendant's bulky pants did not constitute an adequate reason to conduct the strip search, because "the impediment to effective searches posed by bulky outerwear disappears when the outerwear disappears." *Id.* at 323. The Court also specifically rejected the Commonwealth's argument that the *Thomas* case permits a strip search to be performed as incident to a lawful arrest. *Id* at 321, n.3.

NOTE: The *Thomas* decision suggests an even higher standard for manual (as opposed to mere visual) body-cavity searches, one that requires "a strong showing of particularized need supported by a high degree of probable cause." *Thomas, supra* at 408; *quoting Rodriques v. Furtado,* 410 Mass. 878 (1991).

SEARCH AND SEIZURE: WARRANTLESS SEARCH OF AUTOMOBILE; WARRANTLESS ARREST; EXIGENT CIRCUMSTANCES

The defendant was convicted as a joint venturer of masked armed robbery, assault and battery by means of a dangerous weapon, assault with intent to rob, and carjacking and individually of rape and assault with intent to commit rape. *Commonwealth v. Street*, 56 Mass. App. Ct. 301 (2002). On appeal, he argued that evidence taken from his automobile should have been suppressed. The police had gone to the scene and had interviewed the two victims. They recovered the car of one of the victims and, acting on a tip, went to the apartment of one of the alleged joint venturers, one Silva, where they saw car speakers matching those described as having been stolen from the victim's car. Silva admitted his involvement and gave the police the name of others involved, including a black male named "Street." He told police that they had driven to the scene in Street's car. He gave the police an address where Street lived with his girlfriend. The police went to that address with Silva, who identified Street's car. The defendant was then arrested. The police officer began to draft affidavits for search warrants for the defendant's apartment and the car. He informed the police who were keeping the apartment under surveillance that the car was going to be towed. The police at the scene then undertook an inventory search, believing mistakenly that the search warrants had been issued and the tow was en route. The search of the automobile yielded a credit card belonging to one of the victims.

The motion judge rejected the Commonwealth's claim that there had been a valid inventory search because the vehicle was not yet in lawful police custody. Moreover, the judge concluded that there were no exigent circumstances because the police were watching the car, and the defendant's girlfriend had not attempted to move the car or to remove anything from it. The judge upheld the search, however, under the "inevitable discovery" exception. The Appeals

Court found it unnecessary to decide whether that exception applied, because it concluded, relying on *Commonwealth v. Motta*, 424 Mass. 117 (1997), and *Pennsylvania v. Labron*, 518 U.S. 938 (1996), that since there was probable cause to believe that the car was involved in the incident and was likely to contain or provide evidence of the crimes, there was no requirement that exigent circumstances be shown to justify the warrantless search beyond the inherent mobility of the automobile itself.

As for evidence (pants and sneakers) which was seized from the defendant at the police station, a second motion judge concluded that the warrantless arrest of the defendant in his apartment was valid due to exigent circumstances. The Appeals Court rejected this rationale because there was no showing that it would have been impracticable to obtain an arrest warrant since there were a number of police officers at the apartment who were keeping it under surveillance and could have prevented flight. The Appeals Court also rejected the claims that (1) the police could not have obtained a warrant until the defendant identified himself, at which time there were exigent circumstances, and (2) that the defendant was actually arrested outside his apartment and so no warrant was necessary. Under *Commonwealth v. Marquez*, 434 Mass. 370, 376 n.5 (2001), the SJC in dicta, declined to follow *United States v. Santana*, 427 U.S. 38 (1976). The SJC reasoned that the analysis should not turn on where the arrestee was standing when he or she opens the door and so a warrant would be required even if the police are standing in a common hallway and the defendant at or on the threshold of the apartment. But the Appeals Court upheld the seizure of the pants and sneakers at the police station under a different aspect of *Marquez* in which the SJC adopted the reasoning of *New York v. Harris*, 495 U.S. 14 (1990), in which the U.S. Supreme Court held that a statement given at the police station after Miranda warnings, but following an illegal arrest, need not be suppressed. Only evidence taken from a defendant at the time of the arrest in the home must be suppressed.

SEARCH AND SEIZURE: WIRETAP SURVEILLANCE; "ONE-PARTY CONSENT" EXCEPTION TO WARRANT REQUIREMENT

After obtaining a "regular" warrant under G.L. c. 276, the police conducted electronic surveillance of the defendant's conspiring with a police informer to kill one prospective victim and shoot another in the knees. Though the police did not obtain an electronic surveillance warrant, as provided by G.L. c. 272, §99 F-M, Appeals Court ruled that the electronic surveillance evidence was properly introduced under G.L. c. 272, §99 B 4, which allows for warrantless electronic surveillance of communications consented to by one of the parties (here, the police informer) if the police are investigating a "designated offense" listed in §99 B 4, occurring in connection with organized crime. The crimes with which the defendant was charged included the "designated offenses" of assault and battery with a dangerous weapon, murder, and solicitation to commit either of the two. The organized crime connection was "adequately suggested" by the police informer's description of the defendant's proposition, as well as by the facts that the defendant did not know one of the prospective victims but had himself been hired to kill him, that the defendant was to supply the police informer with a gun, silencer, car and airline ticket, and that the defendant would drive the getaway car and provide an alibi. "These factors," the court ruled, "suggesting that the defendant was not acting alone but was drawing on other resources, lend themselves to inferences of discipline and organization…" *Commonwealth v. Abdul-Kareem,* 56 Mass. App. Ct. 78, 80 (2002).

SELF-INCRIMINATION, PRIVILEGE AGAINST: WITNESS' MENTAL FUNCTIONING HELD SUFFICIENTLY INCULPATORY TO ALLOW INVOCATION

In *Commonwealth v. Dagenais*, 437 Mass. 832 (2002) the Commonwealth presented

evidence that defendant's fingerprints were lifted from duct tape on the victim's body. (The extensive facts are summarized at ***EVIDENCE: AUTOPSY PHOTOGRAPHS ADMISSIBLE TO SHOW COMMONWEALTH'S THEORY OF DEATH***.) The defendant suggested that a correctional officer had contrived to get his fingerprint on a piece of duct tape and substituted it for that retrieved from the body. The defendant sought to call a fellow inmate as a witness who could testify to some interaction between the defendant and the correctional officer involving duct tape. The witness had a pending murder charge in the same county for the murder of a police officer, and the lead investigator was the same in both cases. The witness intended to assert a lack of criminal responsibility in his case. After a voir dire, the trial judge permitted the witness to invoke his privilege against self-incrimination to bar questioning.

Because the witness intended to assert a lack of criminal responsibility, his ability to recall and testify about past incidents would "furnish a link in the chain of evidence needed to prosecute." *Commonwealth v. Funches*, 379 Mass. 283, 289 (1979). "No matter how limited, the witness' proffered testimony would have given the Commonwealth an opportunity to inquire about (and demonstrate) his mental and perceptive abilities." *Dagenais*, 437 Mass. at 840 (2002).

PRACTICE TIP: Although the SJC's ruling hurt the defendant in this case, its breadth can be used to the advantage of any defendant planning to assert a lack of criminal responsibility. Counsel could use this case to seek protective orders against even the most routine questioning of a defendant, such as medical history interviews at the jail and even booking questions (if you get there early enough).

SENTENCING: PRE-TRIAL PROBATION; REQUIREMENT OF ADMISSION TO SUFFICIENT FACTS

In *Commonwealth v. Tim T.,* 437 Mass. 592 (2002,) the SJC held that the trial court may not continue a case and place a criminal defendant on pretrial probation in contemplation of dismissal without an admission to sufficient facts over the Commonwealth's objection. The Court reasoned that, because the pre-trial probation statute, G.L. c. 276, §87, does not make provision for a disposition of the case, it must be read with G.L. c. 287, §18, which requires that the defendant admit to sufficient facts in order to have his case continued on probation in contemplation of dismissal. The Court noted that, unless the defendant's admission is obtained prior to placing him on pre-trial probation, so that upon violating probation the defendant may be found guilty of the underlying charge without trial, the Commonwealth could be prejudiced if it had to then try a "stale case." But the Court ruled that pre-trial probation in contemplation of dismissal could be imposed without an admission if agreed to by Commonwealth.

SENTENCING: PROBATION; CONCURRENT SENTENCES; DOUBLE JEOPARDY

In these three companion cases each defendant had been sentenced on multiple charges to concurrent terms of probation but, upon revocation of probation, had "on-and-after" (that is, consecutive) sentences imposed by a different judge than the original sentencing judge. *Commonwealth v. Bruzzese* (and two companion cases*, Commonwealth v. Chirillo; Commonwealth v. Wheeler*) 437 Mass. 606 (2002). In vacating one of the defendant's on-and-after sentences but upholding the on-and-after sentences of the other two defendants, the Supreme Judicial Court ruled that, where the original sentencing judge had intended that the suspended sentences, if executed, were to be served concurrently, a subsequent judge's "unbundling" of the concurrent sentencing scheme in order to impose consecutive sentences constituted multiple punishment for the same offense, in violation of double jeopardy principles. *Bruzzese*, 437 Mass. at 606. Where the judge had not intended that the suspended sentences necessarily be served concurrently, however, upon revocation of probation consecutive sentences could be imposed

PRACTICE TIP: In probation revocation proceedings involving concurrent suspended sentences before a judge who was not the original sentencing judge, counsel should review the original sentencing scheme in order to determine whether it was the intention of the original sentencing judge to limit the defendant's sentencing exposure to concurrent terms. (It is necessary to read *Bruzzese* in order to get a sense of how to determine the original sentencing judge's intentions in this regard). Where there are grounds, and if it is in the defendant's interests to do so, counsel should argue, citing *Bruzzese*, that imposing consecutive sentences, or violating the defendant on some charges while extending probation on others, would constitute multiple punishment in violation of the defendant's double jeopardy protections under the federal Constitution and at Massachusetts common law.

Likewise, where the original sentencing judge had intended to create a concurrent sentencing scheme, a judge revoking probation may not defeat this intention by violating the defendant on some charges while extending probation on the others, for this may result in the defendant later serving consecutive terms on sentences that were originally intended to be served only concurrently.

TRIAL PROCEDURE: REQUEST FOR CONTINUANCE

On the day of trial, defense counsel moved for a continuance saying she was "totally unprepared", that she only had found out the previous day that the case was on for trial, and that the defense depended on medical witnesses who counsel had not spoken with in nearly a year. *Commonwealth v. Philyaw*, 55 Mass. App. Ct. 730 (2002). There was no abuse of discretion in the denial of the motion since there was no adequate proffer of the testimony, the relatively simple case had been pending for some time, there had been many continuances, and counsel had not been diligent in obtaining witnesses.

VERDICTS: DEADLOCKED JURY; TAKING OF PARTIAL VERDICTS ON LESSER-INCLUDED OFFENSES PROHIBITED

The jurors deadlocked in returning verdicts on two indictments: one charging vehicular homicide while under the influence of liquor, the other charging operating while under the influence of liquor causing serious bodily injury (two victims were involved in the accident: one died, the other was seriously injured). After being given the so-called *Tuey-Rodriquez* instruction, the jurors returned still deadlocked. The judge, in a confusing procedure, then took "partial verdicts" of not guilty on the offenses as charged as well as "partial verdicts" of not guilty on the first lesser-included offenses on each charge, of which the jurors had been instructed. The Commonwealth then petitioned under G.L. c. 211, §3 to have the "partial verdicts" set aside, and the single justice reversed and reported the case to the full court.

The Supreme Judicial Court ruled that the judge erred: when a jury deadlocks, trial judges are prohibited from taking partial verdicts on lesser-included offenses contained within a single complaint or indictment. *Commonwealth v. Roth,* 437 Mass. 777 (2002). The Court ruled that "the risks of juror coercion are too high, and the reliability of any such partial verdict returned too low, to warrant such an approach to salvaging some result from a deadlocked jury," so that "such inquiries constitute an unwarranted and unwise intrusion into the province of the jury." The Court pointed out that the trial judge violated "the statutory prohibition on requiring jurors to continue deliberations after their second report of deadlock, G.L. c. 234, §34" which statute "recognizes the coercive effect of continued deliberations in these circumstances." The Court further ruled that the judge erred in relying on the provisions of M.R.Cr.P. 27(b) because that rule, which provides for the taking of verdicts on less than all the indictments or complaints tried, "does not permit the taking of a verdict on anything less than the entirety of a single complaint or indictment." The Court also ruled that the defendant could not be tried again on the

charges for which "partial verdicts" of not guilty were returned, because "as with any other form of error that results in acquittal, the defendant may not be retried on an offense as to which he was acquitted." *Id.* at 795.